Supreme Court, U.S.
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In The

Supreme Court of the United States

SANTA BARBARA BANK & TRUST, *et al.*,

Petitioners,

v.

CANIEVA HOOD and
CONGRESS OF CALIFORNIA SENIORS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2900 (2006), and the decisions of three other federal Circuit Courts of Appeals correctly hold that no presumption against federal preemption of State law exists in the area of national banking activity.

2. Whether a State court must defer to the views of the Office of the Comptroller of the Currency ("OCC"), in regard to federal preemption of state laws affecting national banking activity, pursuant to the doctrine this Court enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

3. Whether the "visitorial powers" doctrine, set forth in 12 U.S.C. § 484(a) and regulations promulgated thereunder by the OCC, bars or limits class action or private attorney general litigation, if the trial court determines that the primary goal of the litigation is to regulate national banking activity or relationships between national banks.

PARTIES TO THE PROCEEDING

The Petitioners herein are: Santa Barbara Bank & Trust; Pacific Capital Bank, N.A.; Beneficial National Bank; Household Bank, f.s.b.; HSBC Taxpayer Financial Services Inc., formerly known as Household Tax Masters, Inc.; JPMorgan Chase Bank, N.A., successor by merger to Bank One, N.A. (Ohio); First Bank of Delaware; Republic First Bank; First Security Bank of Mackinaw, Illinois; Republic Bank & Trust Company; and River City Bank, Inc.

The Respondents are Canieva Hood and Congress of California Seniors.

The Attorney General of California, the National Association of Consumer Advocates and the Center for Responsible Lending appeared as Amicus Curiae in the California Court of Appeal.

Jackson Hewitt, Inc., Cendant Corporation and Tax Services of America were parties to the trial court proceedings but were not parties on appeal and are not petitioners herein.

CORPORATE DISCLOSURES

Pursuant to Rule 29.6, Petitioners make the following disclosures:

Petitioners Beneficial National Bank; Household Bank, f.s.b.; and HSBC Taxpayer Financial Services Inc.: As a result of a corporate merger in 1998, Beneficial National Bank was merged into Household Bank, f.s.b. In 2003, Household Bank, f.s.b., was dissolved and its remaining assets were sold to various entities. Assets relating to the tax refund anticipation loan program at issue in this case were sold to a predecessor of HSBC Taxpayer Financial Services Inc. At the time of Household Bank, f.s.b.'s dissolution, Household Finance Corporation agreed to guarantee any and all contingent obligations of Household Bank, f.s.b. Subsequently, Household Finance Corporation's name was changed to HSBC Finance Corporation. HSBC Taxpayer Financial Services Inc. and HSBC Finance Corporation have a common corporate parent, HSBC North America Holdings Inc., which is a wholly-owned subsidiary of HSBC Holdings plc. HSBC Holdings plc is publicly traded.

Petitioner JPMorgan Chase Bank, N.A., successor by merger to Bank One, N.A. (Ohio), is a wholly-owned subsidiary of JPMorgan Chase & Co., which is publicly traded.

Petitioner Pacific Capital Bank, N.A., is a wholly-owned subsidiary of Pacific Capital Bancorp, a California corporation. There is no parent of Pacific Capital Bancorp and there is no public company that owns 10% of Pacific Capital Bancorp. Petitioner Santa Barbara Bank & Trust is a division of Pacific Capital Bank, N.A.

CORPORATE DISCLOSURES – Continued

Petitioner Republic First Bank is a wholly-owned subsidiary of Republic First Bancorp, Inc., a publicly traded company.

Petitioner First Bank of Delaware is a publicly traded company. There is no parent company or any publicly held company that owns 10% or more of First Bank of Delaware.

Petitioner First Security Bank of Mackinaw, Illinois is a wholly-owned subsidiary of Mackinaw Valley Financial Services, Inc. Neither entity is publicly traded and there is no public company that is a 10% owner of either entity.

Petitioner Republic Bank & Trust Company is a wholly-owned subsidiary of Republic Bancorp, Inc. Republic Bancorp, Inc. is a publicly traded company.

Petitioner River City Bank, Inc. is a wholly-owned subsidiary of First Breckinridge Bancshares, Inc. Neither entity is publicly traded and there is no public company that is a 10% owner of either entity.

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OPINIONS ENTERED IN THE CASE

The order of the Supreme Court of California denying review of the opinion of the California Court of Appeal, Second District, is unreported. [Pet. App.[1] 52a.] The order of the California Court of Appeal denying rehearing is unreported. [Pet. App. 34a.] The opinion of the California Court of Appeal is reported at *Hood v. Santa Barbara Bank & Trust*, 143 Cal. App. 4th 526 (2006). [Pet. App. 1a-33a.] The judgment of the Superior Court of the State of California, Santa Barbara County, is unreported. [Pet. App. 35a-51a.]

BASIS FOR SUPREME COURT JURISDICTION

The Supreme Court of California denied Petitioners' petition for review on January 3, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); and Supreme Court Rule 13.1.

The judgment below comes within two of the four exceptions to the finality requirement set out in *Cox*, 420 U.S. at 479, 482-83:

> [(1) where] there are further proceedings – even entire trials – yet to occur in the state court[] but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. . . . [or (2)] where the federal issue has been finally decided in the state court[] with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather

[1] "Pet. App." refers to the Petitioners' Appendix attached hereto.

> than merely controlling the nature and character of . . . the state court proceedings still to come.

See also id. at 482-83 (noting that the Court will exercise jurisdiction "if a refusal immediately t review the state-court decision might seriously erode federal policy"); *see also Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 558 (1963) (exercising jurisdiction under *Cox* and recognizing that national banks "are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as [Congress] permit[s]").

The views of the Court of Appeal below as to the federal preemption defense are clear and unlikely to be altered absent action by this Court. It will seriously erode the primary goal of the National Bank Act – to protect national banks from hostile acts of State governments – to force the defendant national bank here to undergo a full trial on the merits of the State law claims, and then to appeal any adverse judgment in order to have the important preemption issues presented here resolved. Indeed, the continued persistence of the published *Hood* opinion, unless corrected by this Court, will impede the ability of any national bank to pursue a preemption defense consistent with and as expressly contemplated by the OCC's regulations. Accordingly, section 1257 is satisfied for the reasons set forth in *Cox* and *Mercantile National Bank*.

Pursuant to Supreme Court Rule 29.4, Petitioners certify that 28 U.S.C. § 2403(b) may apply and that this petition has been served upon the Attorney General of California.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Relevant excerpts of U.S. Const. art. VI, cl. 2; Title 12 U.S.C. §§ 24 (Seventh), 93a and 484; Title 12 C.F.R. §§ 7.4000, 7.4007, 7.4008 and 7.4009; California Business and Professions Code Section 17200, *et seq.*; California Civil Code Section 1750, *et seq.* and California Civil Code Section 1788, *et seq.*, are reprinted in the appendix to this petition. [Pet. App. 53a-68a.]

STATEMENT OF THE CASE

A. INTRODUCTION

This Court should grant certiorari to ensure that State courts follow a bedrock principle of federal banking law under the National Bank Act. In the context of national banking regulation, no presumption against federal preemption of State law exists. This is a key holding of the Sixth Circuit Court of Appeals in *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005) ("*Watters*"), *cert. granted*, 126 S. Ct. 2900 (U.S. June 19, 2006) (No. 05-1342), now pending before this Court. It also is the holding of three other Circuit Courts of Appeals. *See Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3233 (U.S. Sept. 30, 2005) (No. 05-431); *National City Bank v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3267 (U.S. Nov. 7, 2006) (No. 06-653). Thus, when the OCC regulates a national bank's powers, a State and its courts must apply the OCC's regulations and may not attempt to impose a parallel system of regulation on the bank. Nor may a State and its courts attempt to evade the OCC's regulations by construing them narrowly.

These fundamental principles of federal law apply both in the context of direct regulation by a State official, and also to indirect attempts to regulate, such as through use of the State's tort system or through a system of "private attorney general" enforcement of the State's statutes. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 885 (2000) (state law tort claim may be preempted). A split California Court of Appeal, contrary to the judgment of the California Superior Court, found the federal precedents not "controlling" in California, and thus declined to apply them in the instant litigation.

If this Court affirms *Watters* as the law of the land, Petitioners respectfully submit that the California Court of Appeal committed a plain and egregious error of federal

law requiring redress by this Court pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2. "National banks have been National favorites. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States. . . ." *Tiffany v. National Bank of Missouri*, 85 U.S. 409, 413 (1874). Accordingly, this Court should grant certiorari to confirm its ultimate authority over questions of federal law, and to send a clear message that State courts must obey its pronouncements.

The national banking activity at issue in this litigation involves "Refund Anticipation Loans" ("RALs"), which are loans to federal taxpayers against their anticipated federal income tax refunds. [Pet. App. 3a, 70a-90a.] *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 4 (2003); *Cades v. H&R Block*, 43 F.3d 869, 872 (4th Cir. 1994). Loans against State tax refunds are not at issue.

The Plaintiffs (Respondents on this Petition for Writ of Certiorari) challenge disclosures made to national banks' RAL applicants. They also challenge a specific provision of a national bank's RAL application form, and seek to have it declared unlawful and unfair as a matter of California statutory and case law. Many national banks that make RALs have agreements between them to require applicants for new RALs to authorize repayment of delinquencies owed on RALs obtained in prior tax years, even if the RAL was obtained from the other bank.[2] [*See*

[2] Such agreements are well understood to be within national banks' powers. *See Burgos v. Citibank, N.A.*, 432 F.3d 46, 49-50 (1st Cir. 2005) (collection activity engaged in by a national bank "is simply 'part and parcel' of a customary banking activity"); *Miller v. United States Bank*, 865 P.2d 536, 540 (Wash. App. 1994) ("the relationship between a national bank and its customers concerning whether the bank's loan collection practices are unfair or deceptive is specifically regulated by the Comptroller of the Currency" [OCC]). Respondents do not contend that a national bank exceeds its Congressionally authorized powers by entering into a cross-collection arrangement designed to ensure that its

(Continued on following page)

RA[3] 138 (Vol. 1), 390-91 (Vol. 2); *see also* Pet. App. 101a-102a, 105a.] Asserting only State-law claims, Plaintiffs challenge the fairness of the banks' imposing the repayment condition on new RAL applications, and the manner in which the condition is disclosed by the banks to loan applicants. Among other things, Plaintiffs seek to enjoin a national bank's performance of its contractual obligations to other national banks. The trial court granted the banks' motion for judgment on the pleadings, finding that Plaintiffs may not assert these challenges against national banks under State-law liability theories. [Pet. App. 36a, 39a.] The litigation, the trial court recognized, is an effort to use solely State law to impose government by injunction upon the national bank system. [Pet. App. 41a, 43a.] No federal claims were pleaded. [Pet. App. 69a-92a.]

Because the primary goal of the instant litigation is systemic regulation of an important national bank program, the trial court reasoned, the lawsuit unlawfully impedes the exercise of the OCC's powers under federal law to regulate and supervise the national bank system. [Pet. App. 41a-43a.] The terms and conditions of RAL lending by national banks are especially suited to exclusive federal regulation, because potentially contradictory and conflicting rules in 50 States threaten to interfere with national banks' ability to manage this lending on a nationwide basis. *Cf. Beneficial*, 539 U.S. at 10-11 (federal law completely preempts State-law usury claim challenging amount of fee charged on RALs). The trial court correctly recognized that a uniform regulatory approach, under the auspices of the OCC, is best suited to this species of national bank lending. "Preemption does not leave the alleged conduct unregulated, [as] the OCC regulations prohibit national banks from engaging in

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own loans are collected by the counterparty, thus promoting the safety and soundness of both contracting parties.

[3] "RA" refers to the "Respondents' Appendix" filed in the record of the California Court of Appeal on February 7, 2006.

unfair or deceptive practices." [Pet. App. 49a (citing 12 U.S.C. § 45(a)(1) and 12 C.F.R. § 7.4008(c)).]

A divided panel of the California Court of Appeal reversed. *Hood*, 143 Cal. App. 4th at 548 [Pet. App. 3a, 29a]. In doing so, the Court of Appeal announced a position on federal preemption that conflicts with decisions of this Court and of four federal Circuit Courts of Appeals. Review by this Court is essential to bring the California courts into line with the great weight of federal authority, and to reaffirm that the States cannot seek to impose a parallel system of regulatory enforcement on national banks.

B. REGULATORY BACKGROUND

The National Bank Act grants the OCC comprehensive regulatory powers over national banks. 12 U.S.C. §§ 24 (Seventh) & 93a; *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). "Federal supervision of banking has been called probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision. . . . The system may be one of the most [successful systems of economic regulation], if not the most successful." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963) (internal quotations and alterations omitted).

OCC regulations, issued after formal notice-and-comment rulemaking proceedings, provide in pertinent part: "Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized [non-real estate lending or deposit-taking] powers are not applicable to national banks." 12 C.F.R. § 7.4008(d)(1) & 12 C.F.R. § 7.4007(b)(1). "A national bank may make non-real estate loans without regard to state law limitations concerning . . . [t]he ability of a creditor to require . . . credit enhancements or risk mitigants, in furtherance of safe and sound banking practices," or "[t]he terms of credit," or "[s]ecurity property,"

or "[d]isclosure and advertising, including laws requiring specific statements, information or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents," or "[d]isbursements and repayments," or "[r]ates of interest on loans." 12 C.F.R. § 7.4008(d)(2)(ii), (iv), (vi), (viii), (ix) & (x). "A national bank [also] may exercise its deposit-taking powers without regard to state law limitations concerning ... [c]hecking accounts," or "[d]isclosure requirements," or "[f]unds availability," or "[s]avings account orders of withdrawal," or "[s]pecial purpose savings services." 12 C.F.R. § 7.4007(b)(2)(ii), (iii), (iv), (v) & (vii).

The OCC also declares that "there is no presumption against preemption in the national bank context." Bank Activities and Operations, OCC Final Rule, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004). According to the OCC:

> When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure.

OCC Final Rule, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004).

C. FACTUAL BACKGROUND

1. Federal Tax Refund Anticipation Lending And The Cross-Collection Program

National banks' RAL lending programs complement the federal government's tax return filing and tax refund processing system. Because RALs typically are offered in conjunction with professional tax preparers, taxpayers of modest means may, through a RAL, have a professional

prepare their tax returns without having to pay immediately for those services.[4] According to the IRS, more than $2 billion in potential tax refunds goes unclaimed annually by taxpayers who do not file their returns at all.[5] Without RALs to fund tax assistance for lower-income Americans, this figure could be dramatically higher. By funding professional tax assistance, RALs also benefit the federal government because the IRS expends fewer resources processing returns prepared by hand by individual taxpayers not knowledgeable of tax rules. Persons who obtain RALs also must file their returns electronically. [RA 34-41 (Vol. 1).] This promotes the federal government's goal of encouraging electronically filed returns, which are easier and less costly for the IRS to process. [RA 34 (Vol. 1).]

Nationwide, easy access to RALs allows taxpayers to receive funds promptly, regardless of how long it takes the IRS to complete processing returns. Additionally, many taxpayers also elect to receive funds via a RAL because this is more secure than risking having checks lost or stolen from the mail, as happens to 1.5 million tax refund checks annually.[6] These are tangible benefits that justify the cost of RAL lending. Because the ready availability of RALs builds taxpayer confidence in the withholding and

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[4] Internal Revenue Service ("IRS") Publication 1345 outlines various rules that professional tax return preparers must follow in presenting RAL applications to taxpayers. IRS Publication 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*, available at http://www.irs.gov/pub/irs-pdf/p1345.pdf. Among other things, they must advise taxpayers that a RAL is a loan, and must be repaid if the taxpayer's refund is not sufficient to pay the RAL obligation. *Id.* at 44. Tax return preparers also are prohibited by the IRS from engaging in any false or deceptive practice in regard to the marketing of RALs. *Id.* at 45.

[5] *IRS Has $2.2 Billion for People Who Have Not Filed a 2003 Tax Return*, IRS News Release IR-2007-51 (Mar. 6, 2007), available at http://www.irs.gov/newsroom/article/0,,id=168422,00.html.

[6] *See* United States Department of Treasury, Financial Management Service, E-Tax Fact Sheet, available at http://www.fms.treas.gov/news/factsheets/e-tax.html (discussing 2001 data).

refund system, the federal government benefits by having a larger, steadier and more predictable inflow of funds during the course of the year, as taxpayers may allow more of their salary to be withheld than they otherwise would.

When a taxpayer applies for a RAL, the bank creates a special-purpose account to receive the refund, and the taxpayer delivers written instructions directing the IRS to deposit his refund into that special-purpose account. [*See* RA 36 (Vol. 1), 301 (Vol. 2); Pet. App. 98a.] If the application is approved, the taxpayer promptly obtains funds equal to the anticipated refund, less fees associated with the loan and tax return preparation. [RA 36 (Vol. 1); Pet. App. 98a.] Later, after the IRS processes the tax return, funds are delivered electronically into the special-purpose account, and (if all goes as planned) the loan is retired automatically with a zero balance due. [*See* RA 301, 389 (Vol. 2); Pet. App. 98a.]

Sometimes, however, the refund is less than the anticipated amount. Some of the reasons for a refund shortfall include: calculation errors on a return; inaccurate information provided to the tax preparer by the taxpayer; processing errors by the IRS; or government offsets against the refund claim, such as for prior-year taxes or child support obligations. If one of these events occurs, the taxpayer is notified of his responsibility to repay the resulting loan delinquency. If the taxpayer fails to respond, the lending bank notifies other banks with which it has a "cross-collection" agreement like the one challenged in this litigation. [*See* Pet. App. 101a, 113a-117a.] In subsequent tax years, then, the taxpayer will be unable to obtain a new RAL from any participating bank unless he commits to repay the delinquency on the prior RAL. Nevertheless, the taxpayer preserves all his rights under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (the "FDCPA"), including the right to demand that the original lender provide verification of the validity and amount of the debt claimed. [*See* Pet. App. 113a-115a.] An effort to collect on a RAL that is not in fact

owed could subject the collecting bank to suit in federal court under the FDCPA.

The OCC is aware of the national banks' cross-collection program at issue here, noting that it is designed to mitigate against unique delinquency risks associated with RAL lending, and thus promotes national banks' safety and soundness. OCC Interpretive Letter No. 959, p. 3 (Feb. 13, 2003) [RA 206-09 (Vol. 1)]. Because a taxpayer may obtain a RAL without a traditional bank account, and because significant portions of the RAL-borrowing population are mobile, a taxpayer might move from lender to lender, year after year, accumulating RAL delinquencies along the way. [RA 390 (Vol. 2).] Thus, efficient collection is a challenging task, but one that is nevertheless essential to preserve the integrity of RAL lending and to control the costs borne by non-delinquent borrowers. [RA 138 (Vol. 1), 390-91 (Vol. 2).] If banks are prohibited from addressing delinquency in an efficient and effective manner, non-delinquent borrowers ultimately will bear the consequences through higher fees or reduced credit availability. [RA 391 (Vol. 2).] The cross-collection program appropriately addresses these issues, because RAL borrowers tend to be repeat borrowers (although not necessarily from the same bank) and because the banks' arrangement is an efficient and fair alternative to other collection methods. In 2005, the OCC rejected requests by consumers to take administrative action against banks participating in the RAL cross-collection program.[7]

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[7] *See* Decision re Application to Merge First Bank of San Luis Obispo (July 12, 2005), at 2-3, available at http://www.occ.treas.gov/interp/aug05/cd05-11.doc & Decision re HSBC Bank Nevada, N.A. Application to Merge, Etc. (Nov. 3, 2005), at 3, available at http://www.occ.treas.gov/interp/dec05/crad129.doc. The OCC issued these decisions *after* the trial court issued its decision granting the banks judgment on the pleadings. These decisions were brought to the attention of the California Court of Appeal, but the Court of Appeal disregarded them, erroneously, stating that in the absence of a "clear indication that the OCC condones" the exact practice challenged here, the OCC's decisions

(Continued on following page)

2. Hood's Delinquent Loan

In 1995, Respondent Hood obtained a RAL from Petitioner Beneficial National Bank ("Beneficial"). [Pet. App. 113a, 117a.] Due to an IRS error that year affecting many RALs, the IRS ignored Hood's written instructions directing delivery of her entire tax refund to Beneficial, and directly paid Hood funds intended to retire her RAL. [RA 38 (Vol. 1), 299-300 (Vol. 2); *see also* Pet. App. 98a.] Hood was one of many taxpayers that year who kept money sent directly to them because of the IRS's mistake, and who did not repay the RAL in spite of being requested to do so. [RA 38 (Vol. 1); *see also* Pet. App. 113a, 117a.] In part to mitigate against the risks of government error in the processing of tax refunds (such as occurred in 1995), the major RAL-issuing national banks, including Beneficial and Petitioner Santa Barbara Bank & Trust ("Santa Barbara"), agreed to require, as a condition of new RAL applications, that taxpayers authorize repayment of any delinquent RAL to a bank participating in the cross-collection program. [*See* RA 138 (Vol. 1), 390-91 (Vol. 2).]

On January 31, 2002, Hood visited a Jackson Hewitt professional tax preparation center.[8] [Pet. App. 77a.] Hood again applied for a RAL, this time from Santa Barbara, a national bank with which she had not previously dealt. [*See id.*] Hood's RAL application expressly disclosed in writing that, in consideration of having Santa Barbara consider her application, she authorized Santa Barbara to repay any delinquent RAL owed to another participating RAL lender. [Pet. App. 101a-102a, 105a.] The application also expressly disclosed Beneficial as a participating bank. [Pet. App. 101a.] Hood also signed a separate document,

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are of no consequence. *See Hood*, 143 Cal. App. 4th at 548 [Pet. App. 29a]. The Court of Appeal also found immaterial the OCC's discussion of RAL cross-collection agreements in its 2003 interpretive letter. *Id.*

[8] Jackson Hewitt was a party in the trial court proceedings but not on the appeal or on this Petition for Certiorari.

again disclosing that she might not receive any payment if she owed money on a prior-year RAL. [RA 387 (Vol. 2).] Because she applied for a RAL, Hood was not required to advance any cash to have Jackson Hewitt professionally prepare and electronically file her tax return. [RA 387 (Vol. 2); Pet. App. 93a-112a.]

In February 2002, Santa Barbara notified Hood that, because she owed Beneficial for the 1995 RAL, her tax refund would be used to pay down that debt. [Pet. App. 113a.] Santa Barbara advised Hood in writing of her rights under the federal FDCPA. [Pet. App. 113a-115a.] After Hood requested and received verification of the debt pursuant to the FDCPA, Santa Barbara remitted the tax refund proceeds to the holder of the debt, Beneficial's successor, and Hood's loan account there was credited for the amount remitted. [*See* Pet. App. 78a-79a, 101a-102a, 117a.]

Hood does not dispute the validity or amount of her 1995 RAL debt to Beneficial. Nor does she dispute that her account was properly credited. Rather, she challenges the disclosures she received and the cross-collection arrangement itself, arguing that Santa Barbara violated her rights under State law by including the repayment condition in her RAL application, and then by remitting funds to the holder of the 1995 RAL debt.

D. PROCEDURAL HISTORY

On March 18, 2003, Hood and the Congress of California Seniors ("Seniors") filed a complaint (subsequently amended) against Santa Barbara and against the firm that prepared Hood's tax return. [AA[9] 1-25; Pet. App. 35a,

[9] "AA" refers to the Appellants' Appendix filed in the record of the California Court of Appeal on November 1, 2005.

69a-92a].[10] The operative complaint is the Third Amended Complaint. [Pet. App. 36a, 69a-92a] Hood sued Santa Barbara under the California Unfair Competition Law ("UCL"), the California Consumers Legal Remedies Act and the California Robbins-Rosenthal Fair Debt Collection Practices Act, and for common-law conversion. [*Id.*] Seniors sued as a "private attorney general" under the California UCL. [Pet. App. 85a-87a.] Hood and Seniors seek to represent a nationwide class of federal taxpayers whose refunds were remitted by Santa Barbara to other banks pursuant to cross-collection agreements.

On October 12, 2004, Santa Barbara filed a cross-complaint against Beneficial and other RAL lenders (all Petitioners herein), alleging that to the extent Santa Barbara delivered funds to the other RAL lenders, those lenders should indemnify Santa Barbara for any liability to the proposed class of federal taxpayers. [*See* Pet. App. 6a; AA 92.] The indemnity cross-defendants answered Santa Barbara's cross-complaint and certain of them filed special answers[11] to Hood's and Seniors' Third Amended Complaint. [*See* RA 13 (Vol. 1).]

All the banks then moved for judgment on the pleadings or, in the alternative, for summary adjudication, arguing that federal law, including the National Bank Act and OCC regulations promulgated thereunder, preempted Plaintiffs' State-law claims against Santa Barbara. [Pet. App. 6a-7a; AA 116-63.] After briefing and oral argument, the trial court found as a matter of law that OCC regulations preempt all of Plaintiffs' State-law claims. [Pet. App.

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[10] The original complaint was filed in the Superior Court of California, County of San Francisco. On Santa Barbara's motion, the case was transferred to Santa Barbara County.

[11] Under California law, a "special answer" permits a cross-defendant, joined in suit on an indemnity claim, to assert further affirmative defenses to claims by the plaintiff in the underlying suit against the defendant/indemnity cross-complainant. *See* Cal. Civ. Proc. Code § 428.70(b).

39a.] The trial court issued a written decision and entered a final judgment on the pleadings against Plaintiffs, and in favor of the banks, on May 18, 2005. [Pet. App. 35a-51a.] Plaintiffs appealed the judgment, and a divided panel of the California Court of Appeal reversed on September 28, 2006. *Hood*, 143 Cal. App. 4th at 548 [Pet. App. 3a, 29a].

The banks timely filed a petition for rehearing in the appellate court on October 13, 2006. Among other things, the banks argued that *Watters* was pending before this Court and set for argument, and that accordingly the Court of Appeal should await this Court's ruling in *Watters*. The Court of Appeal denied the petition for rehearing on October 26, 2006, with one appellate justice again dissenting. [Pet. App. 34a.] The banks timely filed a petition for review with the California Supreme Court on November 7, 2006, again advising the court of the pendency of *Watters*. The petition for review was denied on January 3, 2007, with only five of seven justices deliberating. [Pet. App. 52a.]

This Petition for Writ of Certiorari timely follows.

E. THE KEY FEDERAL QUESTIONS REQUIRING ACTION BY THIS COURT

1. What Legal Presumption Applies?

The trial court correctly found that California laws may not be used to challenge either the legality of the banks' agreements, or how the cross-collection arrangement was disclosed by Santa Barbara to RAL applicants, because the National Bank Act, and OCC regulations thereunder, preempt all such State laws. The trial court further recognized, following an overwhelming line of federal authority, that in the national banking context, no presumption against preemption of State law exists.

The Court of Appeal, by contrast, disregarded substantial contrary federal authority and applied a presumption *against* preemption. *Hood*, 143 Cal. App. 4th at 536-37, 548 [Pet. App. 9a-12a, 29a]. The court ruled that the presumption against preemption requires the OCC's regulations to be narrowly construed to avoid preemption of State law whenever possible. *Id.* Numerous federal authorities were cited by the banks in their briefing to the Court of Appeal, and addressed by the dissenting justice. *See id.* at 549 (Yegan, J., dissenting) [Pet. App. 30a-31a]. These authorities included: *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005) ("the usual presumption against federal preemption of state law is inapplicable to federal banking regulation"); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3233 (U.S. Sept. 30, 2005) (No. 05-431); *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005) (same), *cert. granted*, 126 S. Ct. 2900 (U.S. June 19, 2006) (No. 05-1342). *See also National City Bank v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006) (in the national banking context, "a presumption against preemption . . . does not exist"), *petition for cert. filed*, (U.S. Nov. 7, 2006) (No. 06-653).

This Court should grant certiorari to make clear that, in the context of national banking, State courts may not apply a presumption against federal preemption. Nor may State courts be permitted to undercut the OCC's preemption regulations through a canon of narrow construction. Rather, State courts should be directed to give full effect to the federal goal of protecting national banks from State laws that threaten the banks' ability to operate nationally, and with uniformity, in providing for a geographically diverse and mobile customer base. If *Watters* is affirmed on this basis, certiorari is particularly appropriate here to assure that this Court's dictates in *Watters* are applied in the California courts.

2. Is The OCC Entitled To *Chevron* Deference When It Interprets Its Authority Under The National Bank Act To Preempt State Law?

The Court of Appeal expressly refused to accord the OCC the deference normally given federal agencies under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Hood*, 143 Cal. App. 4th at 547-48 [Pet. App. 28a]. The court said that federal agencies are not entitled to full *Chevron* deference when preemption of state law is at issue because preemption is not within the "expertise" of a federal administrative agency. [*Id.*]

The dissenting justice, agreeing with the trial judge, opined that the Court of Appeal's approach was grave error as a matter of federal law: "In my view, the majority should stay out of the federal banking business." *Hood*, 143 Cal. App. 4th at 549 (Yegan, J., dissenting) [Pet. App. 30a]. "Congress expressly charged the OCC with the regulation of national banks. We should defer to its reasonable interpretation of the preemptive scope of that legislative mandate." *Id.* at 549 n.1 [Pet. App. 31a].

The *Chevron* deference question is pending before this Court in *Watters*. This Court also should grant certiorari so that the deference rule to emerge from *Watters* may be applied here.

3. What Is The Scope Of The Visitorial Powers Doctrine?

The third major error of law committed by the Court of Appeal regards "visitorial powers." The National Bank Act confers upon the OCC exclusive regulatory and examination authority over national banks. *See* 12 U.S.C. § 484(a); 12 C.F.R. § 7.4000; *Guthrie v. Harkness*, 199 U.S. 148, 158-59 (1905). This "visitorial powers" doctrine limits States' ability to exercise regulatory authority over national banks or to inquire into their affairs, thus committing all matters that are essentially regulatory to the OCC

for enforcement, whether the source of the rule is substantive federal or State law.[12]

Here, the trial court recognized that the instant litigation, and particularly Plaintiffs' claims for injunctive relief and "private attorney general" relief under the UCL, seek to close down a cross-collection program affecting national banking activities. Plaintiffs' admitted goal is to impose a structural remedy on national banks making RALs, and to dictate terms for the lenders' future dealings with RAL applicants. Thus, the trial court concluded, the core goal is regulation, which unlawfully infringes upon the OCC's visitorial powers. Ample federal authorities support the trial court's conclusion. *See Rose v. Chase Manhattan Bank USA, N.A.*, 396 F. Supp. 2d 1116, 1121-22 (C.D. Cal. 2005); *Bank of America, N.A. v. McCann*, 444 F. Supp. 2d 1227, 1232 (N.D. Fla. 2006); *cf. Silvas v. E*Trade Mortgage Corp.*, 421 F. Supp. 2d 1315, 1319-20 (S.D. Cal. 2006), *appeal filed*, No. 06-55556 (9th Cir. Apr. 20, 2006) (similar result in case against federal savings bank regulated by the federal Office of Thrift Supervision), *appeal filed*, No. 06-55556 (9th Cir. Apr. 20, 2006).

The Court of Appeal declined to follow these authorities, stating that private civil litigation, pursued by non-governmental actors, does not implicate the visitorial powers doctrine. *Hood*, 143 Cal. App. 4th at 541-42 [Pet. App. 17a-20a]. Again, by charting a different path, the Court of Appeal created uncertainty as to whether national banks face uniform regulation at the federal level, or whether instead they must restructure national programs to satisfy divergent laws of the 50 States. Certiorari

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[12] Congress has by statutory amendment granted the States limited visitorial powers over national banks to ensure compliance with unclaimed property and escheat laws. 12 U.S.C. § 484(b). This narrow exception is not at issue here.

should be granted to address whether the visitorial powers doctrine ever may be invoked against a non-governmental plaintiff. "This is more than an individual claim for money damages based on a breach of contract or tort. It is a class action that seeks to regulate not only the terms under which national banks make and collect on RALs, but also the manner in which they conduct business with other national banks." *Hood*, 143 Cal. App. 4th at 550-51 (Yegan, J., dissenting) [Pet. App. 33a].

ARGUMENT

A. The Decision Of The California Court Of Appeal Conflicts With Decisions Of This Court And Numerous Federal Courts Holding That There Is No Presumption Against Preemption In The Area Of National Banking.

This Court should reaffirm longstanding doctrine recognizing that no presumption against federal preemption exists in the context of national banking activity.

The Court of Appeal erroneously held that the trial court should have applied a presumption against preemption of State law. *Hood*, 143 Cal. App. 4th at 536-37 [Pet. App. 11a-12a]. Reasoning that the State statutes Plaintiffs sought to apply were not laws "that targeted banks or sought to regulate banking," the Court of Appeal "narrowly construe[d] the precise language of the federal . . . regulation to determine whether a particular state law claim [was] preempted." *Id.* (alterations omitted); *see also Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1475-76 (2005) (general presumption against federal preemption requires OCC preemption regulations to be construed narrowly); *Gibson v. World Savings & Loan Ass'n*, 103 Cal. App. 4th 1291, 1300 (2002) (California courts apply a "strong presumption" that federal banking law does not preempt consumer-protection claims under California law).

The California Court of Appeal's analysis, however, is inconsistent with federal law, and threatens to undermine the broad powers of national banks, conferred upon them by Congress, to take deposits and make loans. *See* 12 U.S.C. § 24 (Seventh). Where State laws would affect national banks' exercise of those deposit-taking and lending powers, no presumption against preemption exists, as federal courts hold uniformly. Accordingly, no policy of narrow construction of the OCC regulations should apply. Nor must national banks, to obtain the benefit of preemption, prove that the State consciously "targeted" national banking activity. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (state law need not specifically address federally-protected activity to be preempted). It is enough that application of the State's laws would frustrate or pose an obstacle to the accomplishment of the federal purpose. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 31 (1996). "[T]here is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Morales*, 504 U.S. at 386.

"Congress would not want [the] States to forbid, or to impair significantly" national banks' powers. *Barnett*, 517 U.S. at 33; *accord Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744-45 (1996); *NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995); *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978); *First Nat'l Bank v. California*, 262 U.S. 366, 368-69 (1923); *Easton v. Iowa*, 188 U.S. 220, 229-32 (1903); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *see also Atherton v. FDIC*, 519 U.S. 213, 225 (1997) (party seeking preemption must show "significant conflict with, or threat to, a federal interest"). Following this well-established line of authority, four federal Circuit Courts of Appeals expressly hold that, in the context of national

banking activity, no presumption against preemption exists. *Boutris*, 419 F.3d at 956 ("the usual presumption against federal preemption of state law is inapplicable to federal banking regulation"); *Watters*, 431 F.3d at 560-61; *Burke*, 414 F.3d at 315; *National City*, 463 F.3d at 331; *see also Bank of America v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) ("Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 [] (1819), creating an extensive federal statutory and regulatory scheme."); *American Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1016 (E.D. Cal. 2002) ("Consumer protection is not reflected in the case law as an area in which the states have traditionally been permitted to regulate national banks . . . the ordinary rule is one of preemption."). The holding of the California Court of Appeal here (and in *Smith* and *Gibson*, *supra*) directly contradicts this uniform federal precedent.

Here the federal interest is paramount, and this Court should grant certiorari to clarify the law in this area. The OCC has issued preemption regulations that apply to the challenged conduct, and the challenged conduct relates directly to national banks' participation in the federal income tax return filing and refund delivery system. Despite the strong federal interest, the California Court of Appeal improperly looked for a way to avoid preemption. Indeed, the Court of Appeal expressly stated that even the strong connection between RAL lending and the federal income tax system was immaterial to the preemption analysis:

> [The banks] stress that the RAL program involves an activity that has great federal interest. (E.g., RAL's are secured by a federal tax refund; the IRS deposits the refund electronically into an account at a national bank; IRS rules describe disclosure duties of tax preparers assisting taxpayers applying for RALs; and certain components of the RAL program are protected by

> federal patents.) These factors do not control the issue of preemption.

Hood, 143 Cal. App. 4th at 546 n.11 [Pet. App. 25a-26a].

The Court of Appeal's incorrect application of a presumption against preemption, in spite of the long history of federal regulatory activity in the areas of both national banking and the income tax, impaired that court's entire decisionmaking process. Accordingly, certiorari should be granted, and the judgment of the Court of Appeal should be reversed.

B. The Decision Of The California Court Of Appeal Conflicts With The Doctrine Enunciated By This Court In *Chevron*.

The Court of Appeal also departed substantially from this Court's *Chevron* doctrine. According to the Court of Appeal, OCC regulations and statements relating to preemption of state law are not entitled to *Chevron* deference because the banks "have not cited any controlling authority requiring a court to defer to an agency's regulations concerning preemption." *Id.* at 547-48 [Pet. App. 28a]. The Court of Appeal's statement is disingenuous and merely a reflection of its belief that federal authorities are not binding in California. *Id.* at 547. In fact, the banks and the trial court cited numerous authorities from federal courts, such as *Watters*, *Boutris*, *Burke* and *National City*, as well as federal district court authority. Thus, in saying that no "controlling" authority was cited, the California Court of Appeal announced a plain refusal to follow precedent established by this Court and by four federal Circuit Courts of Appeals (the Second, Fourth, Sixth and Ninth).

The California Court of Appeal misapplied the *Chevron* doctrine and should be reversed. Congress expressly empowered the OCC to regulate matters affecting national banks. Accordingly, State courts should defer to the OCC's reasonable judgment, even in regard to preemption issues, unless the plain text of the National Bank Act provides

unambiguous instructions to the contrary. *Chevron* deference is particularly appropriate in the area of National Bank Act preemption, based on Congress's historic concerns with national banks facing the political peril of States seeking to control or limit their activities. *Chevron* deference, therefore, serves the clear federal policy to create a national banking system which may operate uniformly, freely and subject to consistent regulatory standards throughout the United States.[13]

For nearly a century and a half, federal policy has favored protecting national banks from hostile or contradictory treatment at the hands of the States. The National Bank Act is, at its heart, a statute designed to make national banks responsive to a national constituency and to serve the ends of national economic policy. *See Tiffany v. National Bank of Missouri*, 85 U.S. 409, 413 (1874); *Easton*, 188 U.S. 220; *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003); *Smiley*, 517 U.S. 735; *Marquette Nat'l Bank*, 439 U.S. 299; *see also Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183-84 (2d Cir.) (deference to the Office of Thrift Supervision), *cert. denied*, 126 S. Ct. 343 (2005). Congressional policy is to empower the OCC to protect national banks from creative new incursions by the States.

The OCC clearly states that there is no presumption against preemption in the national bank context. 69 Fed. Reg. at 1896. The Court of Appeal, however, disregarded this conclusion of the OCC, and instead said, incorrectly, that the OCC's statements about preemption deserve no deference. *Hood*, 143 Cal. App. 4th at 547 [Pet. App. 28a].

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[13] Because the OCC engages in comprehensive enforcement efforts, including regulation of consumer protection matters, federal preemption leads to *uniform* regulation, not lack of regulation. *See Special Supervision and Enforcement Activities*, 25 Quarterly J. of the Office of the Comptroller of the Currency, No. 1, at 24-25 (Mar. 2006); OCC Annual Report – Fiscal Year 2005, at 26, available at http://www.occ.treas.gov/annrpt/2005AnnualReport.pdf.

This was error because Congress has, through the National Bank Act, unequivocally allowed the OCC to displace State law to extensively regulate national banks. 12 U.S.C. § 93a (giving OCC broad regulatory power). The Court of Appeal's analysis conflicts both with Congressional intent and case law throughout the United States.

For example, in *Boutris*, 419 F.3d at 958, the Ninth Circuit specifically concluded that "the OCC's interpretation of ambiguous language in the Bank Act is entitled to deference under the two-step framework of *Chevron*." Although *Boutris* and other federal cases were briefed exhaustively, the California Court of Appeal declined to address the reasoning of these cases and instead quoted selectively from this Court's *Smiley* decision. *See Hood*, 143 Cal. App. 4th at 547 [Pet. App. 28a]. The Court of Appeal misapplied *Smiley* because *Smiley* strongly suggests that the OCC is entitled to *Chevron* deference as to preemption matters. "It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering. *See Chevron* [etc.]. [T]hat practice extends to the judgments of the Comptroller of the Currency [the OCC] with regard to the meaning of the banking laws." *Smiley*, 517 U.S. at 739 (citations omitted). Indeed, this Court in *Smiley* found "no doubt" as to the specific preemption question then before it. *Id.* at 740-41.

Most significantly, the California Court of Appeal's refusal to follow the Ninth Circuit's *Boutris* decision creates a particularly grave concern. National banks operating in California will be unsure as to which rule applies, because the answer will depend on whether litigation is prosecuted in State court (where *Hood* is the law) or in federal court (where *Boutris* is the law). This Court should grant certiorari to resolve the confusion created by the Court of Appeal's opinion below.

The *Chevron* deference issue is now pending before this Court in *Watters*. If this Court finds in *Watters* that

the OCC is entitled to *Chevron* deference as to preemption issues, then the California Court of Appeal plainly erred, and its judgment should be reversed or vacated.

C. The Decision Of The California Court Of Appeal Conflicts With The "Visitorial Powers" Doctrine, Which Bars Class Action Or Private Attorney General Litigation When The Primary Goal Of The Litigation Is To Regulate National Banking Activity.

The Court of Appeal also erroneously rejected the banks' visitorial powers defense, summarily concluding, "Actions brought by private plaintiffs are outside the scope of the visitorial powers regulation." *Hood*, 143 Cal. App. 4th at 542 [Pet. App. 19a]. Again, the Court of Appeal's opinion conflicts with federal authorities on this question. *See Bank of America v. McCann*, 444 F. Supp. 2d at 1232; *Rose*, 396 F. Supp. 2d at 1121-22; *Silvas*, 421 F. Supp. 2d at 1319-20. Because it is undisputed that the goal of the instant litigation is to impose a structural remedy on a national bank, and to enjoin it from performing its contractual obligations to other national banks, the litigation has a fundamentally regulatory character, such that the visitorial powers doctrine requires dismissal. The trial court and the dissenting appellate justice correctly recognized this, and so too should this Court.

In 1864, the National Bank Act first set forth the visitorial powers doctrine to protect national banks from hostile States. 12 U.S.C. § 484(a) & note; *see* Cong. Globe, 38th Cong., 1st Sess. 1897 (Apr. 27, 1864) ("We wish to induce investments in the new banks. Can anything better be done to promote such a result than to announce to the country that they are founded by the nation, dedicated to the best interests of the nation, and carefully saved from any local interference of any kind, so they shall be national in character and immunities as they are national in name? . . . But making them strong, you will benefit the

Republic at this moment as by a victory in the field." (statement of Sen. Sumner)).

OCC regulations define the agency's exclusive "visitorial powers" to include: "(i) Examination of a bank; (ii) Inspection of a bank's books and records; (iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) Enforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. § 7.4000(a)(2); *see also Guthrie*, 199 U.S. at 158. The Court of Appeal did not take issue with the OCC's definition of visitorial powers, but found that the doctrine applies only to actions commenced by a State itself or one of its officials. *Hood*, 143 Cal. App. 4th at 542 n.6 [Pet. App. 20a].

The National Bank Act provides that only the OCC may exercise visitorial powers over national banks:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice[14] . . . or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 U.S.C. § 484(a).

OCC regulations explain:

> Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks. . . . State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations,

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[14] The parties briefed the "vested in the courts of justice" exception extensively in both the trial and appellate courts. The trial court correctly found that the exception did not apply. [Pet. App. 43a.] The Court of Appeal did not examine this issue, instead declaring categorically that the visitorial powers doctrine never may be asserted in defense to litigation filed by a non-governmental plaintiff.

> inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.
>
> . . .
>
> Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

12 C.F.R. § 7.4000(a)(1) & (3).

This Court has not examined the nature or scope of the visitorial powers doctrine since 1905, when it decided *Guthrie*. Indeed, *Guthrie* is the only opinion of this Court examining the visitorial powers doctrine under the National Bank Act. *Guthrie* held that because the rights of stockholders to inspect the books and records of a corporation were "well-recognized" at common law, Congress did not (in passing the National Bank Act) intend to forbid a shareholder's suit to enforce that right in a State court, so long as the shareholder sought the information for a lawful purpose. *See* 199 U.S. at 159. *Guthrie* simply does not address the question presented here: When class and private attorney general litigation is pursued, can a State court consider the visitorial powers doctrine, given the OCC's statutory role as the exclusive regulator of national banking policy?

Federal courts recognize that litigation brought by a private attorney general, or otherwise on behalf of the public or in an effort to obtain broad public relief, may be barred by the visitorial powers doctrine no matter who is the named plaintiff, unless the suit is authorized by the OCC or Congress. "A visitation . . . includes any attempts to regulate banking activities . . . whether by sending in a team of auditors or filing a lawsuit and conducting discovery as part of the litigation." *Bank of America v. McCann*, 444 F. Supp. 2d at 1232 (enjoining state court litigation pursued by private citizen *qui tam* relators); *Rose*, 396 F. Supp. 2d at 1121-22 (visitorial powers doctrine bars

private attorney general and class action claim brought under California statutes); *see also Silvas*, 421 F. Supp. 2d at 1319-20 (private attorney general claim under California UCL barred because claim, although asserted by a private party, was fundamentally an attempt to regulate lending activities of federally-chartered financial institution); *see also Pennsylvania Bankers Ass'n v. Commonwealth, Bur. of Consumer Protection*, 427 A.2d 730, 732 (Pa. Cmmw. 1981) ("enforcement is a federal prerogative").

Decisions in other jurisdictions are to the contrary, and thus clarification of the visitorial powers doctrine by this Court is essential. *See Best v. U.S. Nat'l Bank of Oregon*, 739 P.2d 554, 572 (Or. 1987) (visitorial powers doctrine does not bar class action against national bank, where plaintiffs challenged checking account fees as excessive as a matter of state law); *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503, 517 n.21 (Cal. 1985) (visitorial powers doctrine does not bar private litigation but may nonetheless limit discovery available to litigants).

The Court of Appeal here improperly drew a bright-line rule, concluding, "Private Parties' Actions Are Not Visitations." *Hood*, 143 Cal. App. 4th at 541 [Pet. App. 17a]. In so ruling, the Court of Appeal said, "Historically, the 'visitations' prohibited by the visitorial powers doctrine involve the act of a government." *Id.* (citation omitted) [Pet. App. 18a]. The Court of Appeal went farther than even the position advanced by the California Attorney General, who said in his *amicus* brief that because private enforcement actions may assist the State in achieving its regulatory goals, "the nature of the enforcement action, not plaintiff's status, is determinative of whether a lawsuit is visitorial or not." [Brief of *Amicus* California Attorney General at 13.[15]]

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[15] Filed on March 20, 2006 in the record of the California Court of Appeal.

By failing to recognize the quasi-regulatory role played by advocacy groups and participants in the tort system, the Court of Appeal erroneously applied too narrow a view of the visitorial powers doctrine. This Court recognizes that tort litigation may take on a fundamentally regulatory character. *See Geier*, 529 U.S. at 885; *see also Griffith v. General Motors Corp.*, 303 F.3d 1276, 1279 (11th Cir. 2002); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381 (7th Cir. 2000). The California Supreme Court also has stated that California's Unfair Competition Law, and particularly the statute's private attorney general provision, "to some extent actually enhances the Attorney General's ambit of operation." *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 575 n.10 (1998). When tort or private attorney general litigation against a national bank takes on a regulatory character, the visitorial powers doctrine must be considered.

The litigation here is pursued on a "private attorney general" theory by a public advocacy group, Seniors, which purports to represent the interests of the general public. Moreover, this litigation is pressed by another well-known political advocacy group (serving as counsel), the Boston-based National Consumer Law Center. The litigation's goal is to enjoin a national bank from performing under contracts with other national banks. Plainly, if such an injunction issues, Santa Barbara would face an enforcement proceeding by the State if it failed to comply. The litigation is no run-of-the-mill dispute between a bank and its customers, and no "well-recognized" right or remedy at common law is at issue. This litigation instead reflects an effort by well-organized political advocacy groups to change national banking policy via a State court proceeding, because they are dissatisfied with the OCC's and Congress's regulatory choices. Fundamentally, Respondents fail to respect the normal political processes for setting national bank regulatory policy, and instead would have a State court set such policy via injunction. The

visitorial powers doctrine forbids this, as the trial court and the dissenting appellate justice understood.

The Court of Appeal's ruling was error. This Court should grant certiorari to settle this important issue of federal law. There is no *per se* bar to invoking the visitorial powers defense in class and private attorney general litigation, when that litigation "seeks to regulate." *See Hood*, 143 Cal. App. 4th at 550 (Yegan, J., dissenting) [Pet. App. 33a].

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant this Petition, issue a writ of certiorari, and reverse or vacate the judgment of the California Court of Appeal.

Respectfully submitted,

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143 Cal.App.4th 526

Court of Appeal, Second District, Division 6, California.
Canieva HOOD et al., Plaintiffs and Appellants,
v.
SANTA BARBARA BANK & TRUST et al.,
Defendants and Respondents.
No. B184489.

Sept. 28, 2006.

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COFFEE, J.

Canieva Hood and the Congress of California Seniors appeal from an order of dismissal of their class action complaint seeking monetary and injunctive relief against Santa Barbara Bank & Trust (Santa Barbara) and other respondents. This dispute concerns Santa Barbara's seizure of Hood's tax refund. While seeking a tax refund anticipation loan (RAL) in 2002, Hood completed Santa Barbara's RAL application which provided that she would (1) pledge her 2001 tax refund as security for a RAL, (2) authorize the IRS to deposit her refund into a Santa Barbara account, and (3) authorize Santa Barbara to use her 2001 refund to pay her preexisting debts to other RAL lenders. Santa Barbara denied Hood's loan application because a third party bank claimed that she owed it money for a preexisting RAL. After the IRS deposited Hood's 2001 refund into the Santa Barbara account, Santa Barbara paid it to the third party bank.

Appellants' complaint includes a tort claim for conversion, and other causes of action based on several laws, including the Consumers Legal Remedies Act (Civ.Code, § 1750 et seq. [the CLRA]), the Unfair Competition Law (Bus. & Prof.Code, § 17200 et seq. [the UCL]), and the Rosenthal Fair Debt Collection Practices Act (Civ.Code, § 1788 et seq.). Although Santa Barbara denied Hood's loan application, the trial court granted respondents' motion for judgment on the pleadings on the ground that federal regulations governing lending and other banking

activities expressly preempted appellants' claims. We reverse.

FACTUAL AND PROCEDURAL HISTORY

Jackson Hewitt, Inc. (Jackson Hewitt) and its affiliates, Cendant Corporation and Tax Services of America market tax preparation services to consumers.[1] Many low income taxpayers who receive the earned income tax credit seek assistance preparing their returns from tax preparation services. With Santa Barbara, Jackson Hewitt and its affiliates offer RAL's and similar products to low income taxpayers and other consumers.

An RAL is a short term loan secured by a consumer's expected tax refund. When a lender accepts an RAL application, it establishes a bank account to receive the tax refund. The RAL applicant signs documents authorizing the IRS to deposit the applicant's tax refund in that account. If the applicant's tax refund is less than expected, or is not deposited, the bank holds the consumer liable for any outstanding RAL balance (including outstanding balances that the applicant may owe to other specified lenders for RAL's issued in prior years), plus late fees. In 2002, Santa Barbara charged an annual percentage rate ranging from 59.35 to 405.58 percent for RAL's.

Banks making RAL's, including Santa Barbara and respondent Household Bank, participate in agreements with other banks to collect outstanding RAL debts from RAL customers (cross-collection agreements). RAL lenders

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[1] Cendant Corporation owns and operates Jackson Hewitt and Tax Services of America.

include a provision in RAL applications to implement the cross-collection agreement (cross-collection provision).

Appellant Hood is a taxpayer who received the earned income tax credit for several years. On January 31, 2002, Hood went to a Jackson Hewitt office for tax preparation service. A Jackson Hewitt employee told Hood that she had two options for a quick refund – a "rapid refund" that she could receive the next day, or another refund that would be payable within 48 hours. The Jackson Hewitt employee did not explain that these options were loans. Hood selected the option for payment within 48 hours.

After preparing Hood's tax returns, the Jackson Hewitt employee instructed Hood to sign and initial a set of documents. Hood did not have an opportunity to read those documents, including a "Santa Barbara Bank & Trust Refund Anticipation Loan Application and Agreement" (RAL application). The Jackson Hewitt employee did not inform Hood that the RAL application contained a provision allowing Santa Barbara to seize her anticipated tax refund if she had any prior outstanding RAL debts payable to other RAL lenders.

The RAL application consists of four pages, each containing two columns of very fine, single-spaced text. The cross-collection provision appears as section 6, at the bottom of the second page of the RAL application, as follows:

> "COLLECTION OF DELINQUENT RAL. You authorize JHI [Jackson Hewitt] and SBBT [Santa Barbara] to exchange information about your current and prior RALs with other RAL lenders including Bank One, N.A., Beneficial National Bank/Household Bank, First Security

> Bank, River City Bank, County Bank of Rehoboth Beach, DE and Republic Bank & Trust Company/Refunds Now. If you have delinquent RALs from prior years with SBBT or any one or more of these lenders that have not been discharged in bankruptcy, you will not be eligible for a RAL but will instead receive an ACR [Accelerated Check Refund]. Upon receipt of your tax refund, you authorize SBBT to deduct from the Account, after deducting the applicable fees as set forth in Section 2 above, the total amount due on the prior year RALs and forward such amount to the appropriate RAL lender(s) prior to disbursing the balance of the Account to you."

The cross-collection provision is referenced elsewhere in the RAL application, for example, as "amounts due pursuant to section 6" or as "the collection authorizations in section 6." This provision implements cross-collection agreements whereby participating banks collect each others' RAL debts by seizing the tax refunds of taxpayers who apply for RAL's or similar products.

In signing the RAL application, the applicant acknowledges having read, understood, and agreed to each of its terms and conditions and having consented to the collection authorizations in section 6. The applicant also assigns his federal income tax refund and his "[a]ccount, and all funds deposited therein, to the extent necessary to reimburse [Santa Barbara] for . . . any other amounts pursuant to this RAL application." In addition, the applicant certifies having "read all documents relating to [the] RAL Application." (RAL Application, sections 7, 8, 9.)

Santa Barbara sent Hood a letter dated February 3, 2002, stating that her RAL was denied because Santa Barbara had "been informed of an outstanding [RAL] debt

with [Household Bank]." Santa Barbara's letter stated that Hood's 2001 tax refund would be used to satisfy the Household Bank RAL debt and that Santa Barbara would send Hood any funds remaining after the Household Bank RAL debt was satisfied.

Hood did not receive her 2001 tax refund. Nor did she receive the Accelerated Check Refund described in the RAL application as an alternative product for applicants who were ineligible for RAL's. Without her tax refund, Hood could not pay her rent and she received an eviction notice. Hood and other class members suffered substantial economic losses as a result of the seizure of their tax refunds.

Appellants filed an amended class action complaint seeking damages and other relief for the tort of conversion, and under the UCL, the CLRA and the Rosenthal Fair Debt Collection Practices Act. Respondents filed demurrers to appellants' third amended complaint. The trial court overruled the demurrers to the third amended complaint (except as to one cause of action against Jackson Hewitt and another cause of action against Cendant Corporation and Tax Services of America).

After the court overruled respondents' demurrers, Santa Barbara filed a cross-complaint seeking indemnity from other cross-collection agreement participants: Household Bank, F.S.B.; Beneficial National Bank; Household Tax Masters, Inc.; Bank One, N.A. (Ohio); First Bank of Delaware; Republic First Bank; First Security Bank of Mackinaw, Illinois; Republic Bank & Trust Company; River City Bank, Inc. Santa Barbara and the cross-defendants filed motions for judgment on the pleadings or, in the alternative, for summary adjudication, based on the

affirmative defense of preemption. Because the trial court had issued orders limiting discovery, appellants opposed the motion for summary adjudication as premature while substantively opposing the motion for judgment on the pleadings. The trial court granted the motion for judgment on the pleadings on the ground that the regulations of the Office of the Comptroller of the Currency (OCC) expressly preempted appellants' state law causes of action.

DISCUSSION

The trial court concluded that appellants' claims were expressly preempted by provisions of the OCC's "visitorial powers" regulation (12 C.F.R. § 7.4000(a)),[2] deposit-taking regulation (§ 7.4007(b)(2)(ii), (iv)), and non-real estate lending regulation (§ 7.4008(d)(2)(ii)). The trial court did not decide whether appellants' claims were also barred by the provisions in the OCC regulations that preempt state laws that obstruct, impair, or condition a national bank's ability to fully exercise its federally authorized deposit-taking powers (§ 7.4007(b)(1)), or non-real estate lending powers (§ 7.4008(d)(1)), or any other federally authorized powers (§ 7.4009(a)). The trial court consequently did not consider the evidence that respondent banks offered to show that the application of state law to the RAL lending program would more than incidentally affect the exercise of their federally authorized powers.[3]

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[2] All further section references are to parts of title 12 of the Code of Federal Regulations unless otherwise specified.

[3] The trial court did not reach the motion for summary adjudication and expressly stated that further discovery would not influence its decision.

I

Standard of Review

"'A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. [Citations.]' (*Cloud v. Northrop Grumman Corp.* [1998] 67 Cal.App.4th [995,] 999, 79 Cal.Rptr.2d 544.) '"Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action."' (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300, 58 Cal.Rptr.2d 855, 926 P.2d 1042.) '"[W]e are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been stated." [Citation.]' (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198, 51 Cal.Rptr.2d 622.) We accept as true the complaint's factual allegations and give them a liberal construction. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516, 101 Cal.Rptr.2d 470, 12 P.3d 720.) 'We consider evidence outside the pleadings which the trial court considered without objection. [Citation.]' (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1721, 53 Cal.Rptr.2d 662.)" (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064-1065, 20 Cal.Rptr.3d 562.)

"Because a motion for judgment on the pleadings, like a demurrer, raises only questions of law, we may consider new theories on appeal to challenge or justify the trial court's ruling. (*O'Neil v. General Security Corp.* (1992) 4 Cal.App.4th 587, 606, 5 Cal.Rptr.2d 712; *B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959, 230 Cal.Rptr. 192.) '[W]e review the trial court's

disposition of the matter, not its reasons for the disposition. [Citation.]' (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448, 37 Cal.Rptr.2d 790.)" (*Burnett v. Chimney Sweep, supra,* 123 Cal.App.4th at p. 1065, 20 Cal.Rptr.3d 562.)

Similarly, a trial court's determination on issues regarding federal preemption involves questions of law which we independently review on appeal. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612, 115 Cal.Rptr.2d 765.) In independently determining the preemptive effect of statutes or regulations, we do not defer to the trial court's conclusion or limit ourselves to the evidence of intent considered by the trial court. (*Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1297, 128 Cal.Rptr.2d 19.)

II

General Principles of Preemption

Congress has the authority to preempt state law by virtue of the supremacy clause of the United States Constitution, which provides that "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2; *Washington Mutual Bank v. Superior Court, supra,* 95 Cal.App.4th at p. 612, 115 Cal.Rptr.2d 765, citing *Smiley v. Citibank* (1995) 11 Cal.4th 138, 147-148, 44 Cal.Rptr.2d 441, 900 P.2d 690.) Three forms of preemption may occur: (1) Express preemption: "'where Congress expressly specifies that its enactment preempts state law'"; (2) field preemption: "'where the scheme of federal regulation is

so pervasive that there is a reasonable inference Congress intended to dominate the field and state laws on the same subject are precluded'"; and (3) conflict preemption: "'where federal law actually conflicts with state law and it is impossible for a private party to comply with both requirements.'" (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1476, 38 Cal.Rptr.3d 653 (*Smith*), review den. Apr. 26, 2006, citing *Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1204-1205, 83 Cal.Rptr.2d 247.)[4]

"'Federal regulations may preempt state law just as fully as federal statutes. [Citation.] An agency may preempt state law through regulations that are within the scope of its statutory authority and that are not arbitrary.'" (*Smith, supra,* 135 Cal.App.4th at p. 1475, fn. 6, 38 Cal.Rptr.3d 653, citing *Washington Mutual Bank v. Superior Court, supra,* 95 Cal.App.4th at p. 612, 115 Cal.Rptr.2d 765, & other authorities.)

"In determining whether a federal statute or regulation preempts a state law, we begin with the general presumption that under the supremacy clause of the United States Constitution a federal statute or regulation does not preempt a state's historic police powers unless preemption is a clear and manifest purpose of the United States Congress. (U.S. Const., art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407.)" (*Smith, supra,* 135 Cal.App.4th at p. 1475, 38 Cal.Rptr.3d 653.) "'The states' historic police

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[4] Respondents argue appellants' claims are expressly preempted by the OCC regulations, presumably abandoning any argument that those claims are barred by either field preemption or conflict preemption.

powers include the regulation of consumer protection in general and of the banking and insurance industries in particular.'" (*Ibid.;* see also *McClellan v. Chipman* (1896) 164 U.S. 347, 356-357, 17 S.Ct. 85, 41 L.Ed. 461; *Peatros v. Bank of America* (2000) 22 Cal.4th 147, 159, 91 Cal.Rptr.2d 659, 990 P.2d 539; *National State Bank, Elizabeth, N.J. v. Long* (3d Cir.1980) 630 F.2d 981, 985 [banking is an area traditionally subject to dual federal and state control].)

There is a general presumption against preemption unless the state regulates in an area where there has been a "significant federal presence." (*Smith, supra,* 135 Cal.App.4th at p. 1475, 38 Cal.Rptr.3d 653; *United States v. Locke* (2000) 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69.) In *Bank of America v. City & County of San Francisco* (9th Cir.2002) 309 F.3d 551, 558-559, cities sought to regulate banks with ordinances to prohibit charging ATM fees to non-depositors. In that context, the Ninth Circuit declined to apply the general presumption against preemption because the field of banking is an area where there has been a significant federal presence. (See also *Barnett Bank v. Nelson* (1996) 517 U.S. 25, 28, 116 S.Ct. 1103, 134 L.Ed.2d 237 [federal statute authorizing national banks to sell insurance in small towns preempted a *conflicting* Florida law that forbid such sales].)

In the recent *Smith* case, the claims did not involve state or local laws that targeted banks or sought to regulate banking. In that context, the court imposed the burden of showing that specific state law claims were preempted on the party claiming preemption "because preemption of state laws by federal law or regulation generally is not favored." (*Smith, supra,* 135 Cal.App.4th at pp. 1475-1476, 38 Cal.Rptr.3d 653.) The *Smith* court

therefore "narrowly construe[d] the precise language of the federal . . . regulation to determine whether a particular state law claim [was] preempted. [Citations.] 'As to each state law claim, the central inquiry [was] whether the legal duty that is the predicate of the [claim] constitute[d] a requirement or prohibition of the sort that federal law expressly preempt[d].'" (*Id.* at p. 1476, 38 Cal.Rptr.3d 653.) Like the *Smith* court, we narrowly construe the OCC regulations to determine whether appellants' claims are preempted.

III

Federal Banking Laws and Regulations

The National Bank Act (NBA) grants national banking associations (e.g., Santa Barbara and other bank respondents) "all such incidental powers as shall be necessary to carry on the business of banking" by receiving deposits and making loans. (12 U.S.C. § 24.) "As the administrator charged with supervision of the [NBA] [citations], the [OCC] bears primary responsibility for surveillance of 'the business of banking' authorized by [title 12 United States Code section 24 (Seventh)]." (*NationsBank v. Variable Annuity* (1995) 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740.)

In January 2004, the OCC published a final rule amending part 7 of its regulations to add provisions "clarifying the applicability of state law to national banks' operations. The provisions concerning preemption identify the types of state laws that are preempted, as well as the types of state laws that generally are not preempted, with respect to national banks' lending, deposit-taking, and other operations." (69 Fed.Reg. 1904-01 (Jan. 13, 2004).)

The trial court concluded that three of these regulations (the visitorial powers, deposit-taking and non-real estate lending regulations), which became effective February 12, 2004, expressly preempted appellants' claims.

The visitorial powers regulation provides that "[s]tate officials may not exercise visitorial powers with respect to national banks . . . except in limited circumstances authorized by federal law." (§ 7.4000(a)(1).) Visitorial powers include conducting examinations and inspections of national bank records and prosecuting enforcement actions. (§ 7.4000(a)(3).)

The deposit-taking regulation and the non-real estate lending regulation have parallel provisions. For example, each regulation provides that, except where made applicable by federal law, "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking [or non-real estate lending] powers are not applicable to national banks." (§§ 7.4007(b)(1), 7.4008(d)(1).)

The deposit-taking regulation also provides that "[a] national bank may exercise its deposit-taking powers without regard to state law limitations concerning: [¶] . . . Disclosure requirements." (§ 7.4007(b)(2)(iii).) Similarly, the non-real estate lending regulation provides that "[a] national bank may make non-real estate loans without regard to state law limitations concerning: [¶] . . . The ability of a creditor to require . . . risk mitigants, in furtherance of safe and sound banking practices; [¶] . . . [t]he terms of credit . . . ; [¶] [s]ecurity property, including leaseholds; [¶] . . . [and] [d]isclosure and advertising." (§ 7.4008(d)(ii), (iv), (vi), (viii).)

Both the deposit-taking regulation and the non-real estate lending regulation "save" or "exempt" certain state laws (including contracts, tort, and debt collection laws) from preemption. These exemptions apply to the extent that such laws only incidentally affect the exercise of national banks' deposit-taking (or non-real estate lending) powers or are otherwise consistent with the banks' deposit-taking (or non-real estate lending) powers. (See §§ 7.4007(c)(1), (2), (4), 7.4008(e)(1), (2), (4).) These exemptions are sometimes called "savings clauses" or "catch-all" provisions.[5]

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[5] The dissent relies upon *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 385, 112 S.Ct. 2031, 119 L.Ed.2d 157, in asserting that the OCC regulations' general savings clauses do not control over the OCC's more specific express preemption regulations. While *Morales* does provide that "[a] general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision," *Morales* does not apply to this case. *Morales* considered a wholly distinct issue involving a preemption statute within the Airline Deregulation Act of 1978 by which Congress itself had clearly and directly provided that states could not enforce any laws relating to air carriers' rates, routes or services. (*Id.* at pp. 378-379, 112 S.Ct. 2031.) We are not interpreting a congressional act providing for the preemption of state law. In contrast, we are reviewing the application of regulations adopted by the OCC by which the OCC presumes to declare when state law is preempted by its own regulations, without any grant of field preemption from Congress with respect to laws governing national banks. (Congress has not granted the OCC an exclusive regulatory "cradle to grave" authority under the NBA, in contrast to the exclusive authority that it granted to the Office of Thrift Supervision (OTS) under the Home Owners' Loan Act (HOLA). (*Fidelity Federal S. & L. Assn. v. de la Cuesta* (1982) 458 U.S. 141, 145, 166-167, 102 S.Ct. 3014, 73 L.Ed.2d 664.).) Further, for reasons we later explain, we conclude that the "express" preemption regulations (deposit-taking and non-real estate) do not preempt appellants' claims.

IV.

Appellants' State Law Claims

The proposed plaintiff class is composed of all persons who at any time from March 18, 1999, forward, will have or have had their tax refunds seized by Santa Barbara as a result of the RAL procedures and collection methods challenged in the complaint. Appellants bring the class action as private attorneys general pursuant to the UCL, seeking a declaration that Santa Barbara's seizure of refunds for debt collection purposes without consumers' voluntary and knowing consent, and the contract provision permitting such debt collection are unlawful, unfair, deceptive and unenforceable. Appellants also seek orders enjoining Santa Barbara from such seizure of refunds and from engaging in an unlawful, unfair, deceptive and unfair debt collection practice. (Bus. & Prof.Code, §§ 17200, 17203, 17204.)

A. *The Rosenthal Fair Debt Collection Practices Act Claims*

Appellants allege that respondents violated the Rosenthal Fair Debt Collection Practices Act by failing to inform consumers that Santa Barbara would engage in debt collection practices during the loan application and approval process and by falsely representing the nature of their services and failing to include certain legally mandated debt collection notices. (Civ.Code, §§ 1788 et seq., 1788.13, subd. (i).) Appellants seek actual damages, penalty damages of at least $1,000 per violation, and fees, costs, and expenses. (Civ.Code, § 1788.30, subd. (c).)

B. *The CLRA Claims*

Appellants seek injunctive relief and damages pursuant to the CLRA (Civ.Code, § 1750 et seq.), which they allege respondents violated by representing that RAL's are a form of tax refund "when they are loans subject to seizure by the lender to pay off alleged prior RAL debts of individual taxpayers." (Civ.Code, § 1770, subd. (a)(5), (14).) Appellants also allege that respondents violated the CLRA by representing that they have rights and remedies that are prohibited by law, i.e., the right to collect a third party debt without providing notices required by law. In addition, appellants allege that respondents violated the CLRA by including the one-sided, unlawful, unfair, fraudulent and unconscionable "cross-lender debt collection provision" (cross-collection provision) in their RAL application and that the RAL application is an adhesion contract which is offered on a "take-it-or-leave-it basis." (Civ.Code, § 1770, subd. (a)(19).) Appellants further allege that the cross-collection provision substantially deprives them and other consumers of their tax refunds without their voluntary, knowing, and intelligent consent, and that it consequently is unlawful, unfair, fraudulent, and unconscionable. Appellants seek actual and punitive damages against Santa Barbara pursuant to Civil Code sections 1770 and 1780, as well as injunctive relief, restitution, costs, etc.

C. *The UCL Claim*

Appellants seek injunctive relief, restitution, and monetary damages under the UCL because respondents' cross-collection practice violates the Rosenthal Fair Debt Collection Practices Act, the CLRA, offends public policy, is unlawful, unfair, and fraudulent, as well as unconscionable, oppressive, and unscrupulous. (Bus. & Prof.Code,

§ 17203.) Appellants further allege that respondents deceive and mislead consumers by inducing them to sign RAL agreements containing the cross-collection provision because consumers are not clearly and effectively informed about the existence and effect of that provision. (Bus. & Prof.Code, § 17200 et seq.) Appellants' causes of action under the UCL and the CLRA are based on the same predicate acts.

D. *The Conversion Claim*

Hood and similarly situated class members seek actual and punitive damages from Santa Barbara for conversion, alleging that respondents had no valid contract with these class members because they rejected their RAL applications and did not give them any Accelerated Check Refunds.

THE TRIAL COURT INCORRECTLY CONCLUDED THAT FEDERAL REGULATIONS PREEMPTED APPELLANTS' CLAIMS

The Visitorial Powers Doctrine Does Not Preempt Appellants' Claims Because Private Parties' Actions Are Not "Visitations"

The trial court concluded that appellants sought "state court regulation and supervision of the exercise of national [banking] powers." It further concluded that the "visitorial powers doctrine . . . precludes [appellants'] claims that are brought on behalf of a class or the general public," citing title 12 United States Code section 484(a) and section 7.4000(a). We disagree.

The visitorial powers doctrine applies to government actions. That doctrine provides that no national bank

"shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress. . . . " (12 U.S.C. § 484(a).) Visitorial powers include regulating and supervising activities permitted pursuant to federal banking law (e.g., examinations and inspections of bank records) and enforcing compliance with any applicable federal or state laws concerning those activities. (§ 7.4000(a).)

Historically, the "visitations" prohibited by the visitorial powers doctrine involve the act of a government. (See, e.g., *Guthrie v. Harkness* (1905) 199 U.S. 148, 158-159, 26 S.Ct. 4, 50 L.Ed. 130 [which describes the right of visitation as "a public right, existing in the state for the purpose of examining . . . the conduct of the corporation"].) "Because 'visitation' assumes the act of a sovereign body, private actions brought by individuals against banks in pursuit of personal claims ordinarily are outside the scope of visitorial powers rules." (69 Fed.Reg. 1895-01, 1899, fn. 30 (Jan. 13, 2004) [OCC's Final Rule Action, "Bank Activities and Operations"].) The language of the OCC's visitorial powers regulation explicitly contemplates state action: "State officials may not exercise visitorial powers with respect to national banks . . . except in limited circumstances authorized by federal law." (§ 7.4000(a)(1).)

Appellants brought their action as private parties seeking damages for financial losses as well as declaratory and injunctive relief under the "private attorneys general" statute. As the California Supreme Court recognized in *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17-19, 141 Cal.Rptr. 20, 569 P.2d 125, there are fundamental differences between an action filed by a public prosecutor seeking injunctive relief and civil penalties and a

consumer class action filed by a private party. (See also *Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1045, 111 Cal.Rptr.2d 260.) The "filing of a UCL [class] action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant. . . ." (*Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 587, 135 Cal.Rptr.2d 149.) (The Attorney General's only role in this action has been the filing of an amicus brief with this court.) Actions brought by private plaintiffs are outside the scope of the visitorial powers regulation.

In discussing visitorial powers, the trial court concluded that appellants' action is fundamentally regulatory. "[T]he purpose of [appellants'] action is to regulate cross-collection agreements, not to adjudicate an individual dispute." We do not agree that by permitting appellants' claims to proceed, the state is regulating Santa Barbara's conduct. Appellants' ability to sue respondents under the UCL, under the CLRA, for conversion, and for violating debt collection laws does not interfere with what respondents may do or how they may operate their banking business. Put another way, while the state cannot dictate to respondents how they can or cannot operate, it can insist that, however respondents choose to operate, they do so without violating debt collection laws and using deceptive business practices. (See *Fenning v. Glenfed, Inc.* (1995) 40 Cal.App.4th 1285, 1299, 47 Cal.Rptr.2d 715.)

Appellants seek not only declaratory and injunctive relief but also the recovery of damages for class members under several theories. Appellants allege class members suffered substantial economic losses as a result of respondents' seizures of their tax refunds. The visitorial powers

doctrine does not preclude appellants from pursuing their claims.[6]

The OCC's Deposit-Taking and Lending Regulations Do Not Preempt State Tort, Contract, or Debt Collection Laws Unless These Laws More Than Incidentally Affect the Exercise of the Banks' Authorized Powers

Both the deposit-taking regulation and the lending regulation "exempt" or "save" state contract, tort, and debt collection laws from preemption. These exemptions apply to the extent that such laws only incidentally affect the exercise of national banks' deposit-taking (or non-real estate lending) powers or are otherwise consistent with the banks' deposit-taking (or non-real estate lending) powers. (See §§ 7.4007(c)(1), (2), (4), 7.4008(e)(1), (2), (4).)[7] Based on the record before us, it does not appear that the state's contract, tort or debt collection laws have more than an incidental effect on the exercise of national banks'

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[6] Because the visitorial powers doctrine does not apply to appellants' claims, we do not address whether the claims fall within the "courts of justice exception." Nor do we address whether the OCC lacked authority to promulgate section 7.4000 (concerning the visitorial powers doctrine), which the Attorney General asserts "purports to . . . prevent state officials from enforcing a variety of . . . laws against national banks."

[7] In *Smith, supra,* 135 Cal.App.4th 1463, 38 Cal.Rptr.3d 653, Smith had asserted that the deposit-taking regulation (§ 7.4007(b)(2)) should not be applied retroactively to preempt cases based on conduct predating its February 12, 2004, effective date. The trial court adopted the OCC's position that because the deposit-taking regulation was a "clarification of existing law," it could be given retroactive effect. (*Smith,* at p. 1470, 38 Cal.Rptr.3d 653.) The Court of Appeal decided the case without addressing this issue. (*Id.* at p. 1482, fn. 17, 38 Cal.Rptr.3d 653.) Appellants' action challenges conduct that predates the OCC preemption regulations, as well as similar, ongoing conduct.

deposit-taking (or non-real estate lending) powers or are otherwise inconsistent with the banks' deposit-taking (or non-real estate lending) powers.[8]

California's debt collection law, the Rosenthal Fair Debt Collection Practices Act, does not have more than an incidental effect on respondents. Federal courts recognize that national banks and federally regulated thrift organizations are subject to state laws governing debt collection. (See *Bank of America v. City & County of San Francisco, supra,* 309 F.3d at p. 559; *Alkan v. Citimortgage, Inc.* (N.D.Cal.2004) 336 F.Supp.2d 1061, 1064.) "'[S]tates retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.'" (*Wells Fargo Bank N.A. v. Boutris* (9th Cir.2005) 419 F.3d 949, 963, 970.) Appellants' claims seeking relief under state contract, tort or debt collection are not preempted by federal law.

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[8] The trial court did not "rely on [the declaration submitted by respondents to establish] more than an incidental effect" and did not allow appellants to conduct "further discovery to respond to that evidence" because it "would not effect the court's decision." The dissent concludes that appellants' class action "[b]y any standard [would have] more than an incidental impact on the banks' deposit-taking and non-real estate lending powers," as it would regulate the terms under which national banks make and collect on RAL's and the manner in which they conduct business with other national banks.

For reasons previously explained, we reject the argument that a private action such as appellants' is regulatory. Further, if the judgment in this case were sustained on the ground that appellants' pursuit of their claims would have more than an incidental effect on respondents' exercise of its authorized powers without requiring the consideration of evidence from the parties relevant to such effect, it seems that national banks could avoid state law compliance and state court process in nearly any case.

The Deposit-Taking and Non-Real Estate Lending Regulations Do Not Preempt Claims That Are Based on Federally Grounded Obligations

In *Smith, supra,* 135 Cal.App.4th 1463, 38 Cal.Rptr.3d 653, the court held that the OCC's deposit-taking regulation did not preempt Smith's UCL or CLRA causes of action, which were partially based on Wells Fargo's violation of federal law (specifically, the OCC disclosure regulations). Because Smith's UCL cause of action was not based on an alleged violation of a *state* law requiring (or limiting) certain disclosures by Wells Fargo, the court concluded that it was not preempted by the deposit-taking regulation. (*Id.* at pp. 1482, 1487, 38 Cal.Rptr.3d 653.)

Some of the legal obligations that appellants seek to enforce are created by federal law. Appellants seek to redress the violation of federal standards that have been adopted as part of California law. For example, appellants allege that respondents violated Civil Code section 1788.17 of the Rosenthal Fair Debt Collection Practices Act, which requires debt collectors to comply with the federal Fair Debt Collection Practices Act. In addition, title 12, United States Code section 4302(e) prohibits depository institutions from making "any advertisement, announcement, or solicitation relating to a deposit account that is inaccurate or misleading or that misrepresents its deposit contracts." Appellants allege that "[d]efendants deceive and mislead consumers when they induce consumers to sign RAL Agreements containing the [cross-collection provision]"; that defendants have violated Civil Code section 1770, subdivision (a)(5) because they have represented that the RAL's are a form of tax refund when they are loans subject to seizure by the lender to pay off alleged prior RAL debts of individual taxpayers; and that they have violated Civil

Code section 1770, subdivision (a)(14) by representing that they have rights and remedies that are prohibited by law. The facts alleged in the complaint support a legal theory of liability for false and misleading advertising based on the predicate act(s) of violation of federal law regarding required disclosures and prohibited misleading or misrepresentative advertising. (See *Smith, supra,* 135 Cal.App.4th at pp. 1487-1488, 38 Cal.Rptr.3d 653.) Further, title 15, United States Code section 1692e provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." The complaint's alleged facts would support a legal theory of liability for violation of section 1692e also.

An act or practice is "unfair competition" under the UCL if it is forbidden by law. (*Smith, supra,* 135 Cal.App.4th at pp. 1479-1480, 38 Cal.Rptr.3d 653.) The UCL "borrows" violations of other laws, including federal laws, and makes them actionable as unlawful business practices. (See *id.* at p. 1480, 38 Cal.Rptr.3d 653 & authorities cited therein.) Therefore, a violation of federal law may serve as a predicate for a UCL action. (*Ibid.*) The OCC has recognized that the UCL applies to national banks.[9]

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[9] "Unfair or deceptive acts or practices are unlawful under federal and state law." (OCC Advisory Letter 2002-3 (Mar. 22, 2002) p. 3 at <http://www.occ.treas.gov/ftp/advisory/2002-3.doc/as of Sept. 28, 2006>.) "A number of state laws prohibit unfair or deceptive acts or practices, and such laws may be applicable to insured depository institutions. See, e.g., [Bus. & Prof.Code, §§] 17200 et seq. and 17500 et seq." (*Id.* at p. 3, fn. 2.) See *"Gibson v. World Savings & Loan Assn., supra,* 103 Cal.App.4th at pp. 1306-1307, 128 Cal.Rptr.2d 19 [UCL claim against federal savings association based on violation of [OTS] regulations . . . was not preempted]; *Fenning v. Glenfed, Inc.*[, *supra,*] 40 Cal.App.4th at [pp.] 1289, 1299, 47 Cal.Rptr.2d 715 [UCL action against federal

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The *Smith* court concluded that Smith's UCL cause of action "only 'incidentally affect[ed]' [the bank's] deposit-taking powers" because Smith's UCL cause of action in effect was "a tort cause of action based on alleged violations of federal disclosure requirements applicable to Bank regardless of the UCL." (*Smith, supra,* 135 Cal.App.4th at p. 1483, 38 Cal.Rptr.3d 653.) The court further reasoned that it could not be " reasonably . . . or persuasively, argued that Smith's UCL cause of action based on alleged violations of OCC disclosure requirements involves a state law that 'obstruct[s], impair[s], or condition[s]' [the bank's] ability to fully exercise its deposit-taking powers." (*Ibid.,* citing § 7.4007(b)(1).) The court applied similar reasoning to Smith's CLRA cause of action and concluded that neither his UCL nor his CLRA causes of action were preempted. (*Id.* at pp. 1483, 1486-1487, 38 Cal.Rptr.3d 653.)

State laws redressing violations of federal law are not preempted even where those laws offer additional remedies. (See, e.g., *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 495, 116 S.Ct. 2240, 135 L.Ed.2d 700.) The federal Fair Debt Collection Practices Act expressly protects from preemption state laws that provide greater consumer protection than does the federal law. (15 U.S.C. § 1692n.) "Ordinarily, 'state causes of action are not pre-empted solely because they impose liability over and above that

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savings and loan association based on violation of OTS regulations was not preempted]; *Lopez v. World Savings & Loan Assn.* (2003) 105 Cal.App.4th 729, 741-742, 130 Cal.Rptr.2d 42. ['UCL remains available to remedy a myriad of potential unfair, unlawful, and fraudulent practices engaged in by federally chartered savings and loan associations, so long as the practice is outside the scope of federal regulation']." (*Smith, supra,* 135 Cal.App.4th at p. 1479, 38 Cal.Rptr.3d 653.)

authorized by federal law.'" (*Washington Mutual Bank v. Superior Court* (1999) 75 Cal.App.4th 773, 782, 89 Cal.Rptr.2d 560.)[10]

The relevant OCC regulations preempt those state laws that "obstruct, impair, or condition" a national bank's ability to exercise its federally authorized deposit-taking and lending powers. (§§ 7.4007(b)(1), 7.4008(d)(1).) Here, appellants' CLRA, UCL, and Rosenthal Fair Debt Collection Practices Act's causes of action allege facts that would support a cause of action based on violations of federal law that apply to respondents regardless of state law. Thus, those causes of action are not preempted because they do not impose any substantial limitations upon, or "obstruct, impair, or condition" a bank's actions. (See *Smith, supra,* 135 Cal.App.4th at pp. 1483-1487, 38 Cal.Rptr.3d 653.)[11]

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[10] Respondents challenge appellants' ability to pursue their claims alleging a violation of federal law where they did not raise that theory below. That does not bar appellants' reliance on a federal law violation to support their UCL and CLRA theories. "[T]he test of the adequacy of a complaint is whether it alleges sufficient *facts* to support a particular cause of action and not whether it expressly alleges legal theories of liability underlying a cause of action. A complaint is adequate if its factual allegations are sufficient to support a cause of action on any available legal theory (whether specifically pleaded or not). [Citation.] . . . [T]o the extent [respondents] argue[ ] on appeal that [appellants] waived [their] violations of [federal law and other theories or liability under the UCL and CLRA] by not expressly raising those theories in [their] complaint, [respondents] misconstrue [ ] applicable California law. . . ." (*Smith, supra,* 135 Cal.App.4th at p. 1485, 38 Cal.Rptr.3d 653.)

[11] In urging this court to uphold the trial court's ruling that the OCC regulations preempt state law, respondents stress that the RAL program involves an activity that has great federal interest. (E.g., RAL's are secured by a federal tax refund; the IRS deposits the refund electronically into an account at a national bank; IRS rules describe disclosure duties of tax preparers assisting taxpayers applying for

(Continued on following page)

The OCC's Non-Real Estate Lending Regulation Does Not Authorize Banks to Require Mitigants to Protect Third Party Creditors from Risk

The trial court ruled that the national banks' ability to require cross-collection contracts as a risk mitigant or term of RAL credit was expressly preempted from state regulation and laws, in apparent reliance on section 7.4008(d)(2)(ii) and (iv). Respondents describe this section as "a primary ground" of the trial court's ruling.

The trial court's ruling gave an expansive interpretation to the "risk mitigants" permissible under the OCC's non-real estate lending regulation. The ruling enforced a risk mitigant (or term of credit) against Hood and in favor of respondents, including Santa Barbara, in a transaction where Santa Barbara extended no credit to Hood. Santa Barbara's seizure of Hood's 2001 tax refund alleviated a risk incurred by a third party (Household Bank) under a preexisting transaction. The trial court thus applied the non-real estate lending regulation to a transaction where Santa Barbara made no loan and incurred no risk.

We disagree with the trial court's expansive reading of the non-real estate lending regulation. As we have already indicated, we narrowly construe the precise language of the regulation. (*Smith, supra,* 135 Cal.App.4th at p. 1476, 38 Cal.Rptr.3d 653.) The mitigation of risks of third parties is beyond the scope of the non-real estate lending regulation. That regulation encompasses a bank's (lender's) mitigation of its own risk with respect to its extension of credit to an individual borrower. The regulation refers to

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RAL's; and certain components of the RAL program are protected by federal patents.) These factors do not control the issue of preemption.

"[a] bank," "*a borrower's* ability to repay" (§ 7.4008(b), italics added), and "[a] *national bank*['s]" authority to make loans without regard to state law limitations concerning "[t]he ability of *a creditor* to require . . . risk mitigants," or terms of credit. (§ 7.4008(d)(2)(ii), italics added.) This language does not expressly preempt state laws where banks use loan applications to seize consumers' tax refunds for the purpose of collecting the consumers' preexisting debts to third parties. Appellants' claims are outside the scope of preemption encompassed by the non-real estate lending regulation. (See *Gibson v. World Savings & Loan Assn., supra,* 103 Cal.App.4th at pp. 1301-1302, 128 Cal.Rptr.2d 19, citing *Cipollone v. Liggett Group, Inc., supra,* 505 U.S. at p. 516, 112 S.Ct. 2608.)

The Non-Real Estate Lending Regulation Does Not Preempt Claims of Class Members Who Received No Loans

Hood and similarly situated class members received no loans from Santa Barbara. Respondents nevertheless argue that the OCC's non-real estate lending regulations preempt their claims. We disagree. Santa Barbara has no lending relationship with appellants. Consequently, their claims against Santa Barbara and the laws upon which they base those claims are outside the scope of the non-real estate lending regulation.

In addition, respondents argue that "established principles of administrative law" require this court to "defer to the OCC's finding that national banks may participate in RAL cross-collection programs," and that to reach a contrary result "would directly obstruct the OCC's regulatory authority, in violation of longstanding preemption principles." In so arguing, respondents cite *Chevron*

U.S.A. v. Natural Res. Def. Council (1984) 467 U.S. 837, 843-844, 104 S.Ct. 2778, 81 L.Ed.2d 694, and *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 105-114, 112 S.Ct. 1046, 117 L.Ed.2d 239. Respondents also cite recent federal appellate court decisions that uphold the OCC preemption regulations at issue here. We are not bound by lower federal appellate court decisions. (See *People ex rel. Renne v. Servantes* (2001) 86 Cal.App.4th 1081, 1090, 103 Cal.Rptr.2d 870; *People v. Williams* (1997) 16 Cal.4th 153, 190, 66 Cal.Rptr.2d 123, 940 P.2d 710.)

Admittedly, courts defer to administrative agencies concerning areas particularly within their expertise, as in *Arkansas v. Oklahoma, supra,* 503 U.S. at pages 105-114, 112 S.Ct. 1046, where the court granted substantial deference to the EPA's interpretation of Oklahoma's water quality standards. Although respondents urge this court to give deference to the OCC regulations concerning the preemption of state law, respondents have not cited any controlling authority requiring a court to defer to an agency's regulations concerning preemption. The United States Supreme Court has declined to accord deference to an agency regulation purporting to preempt state law, stating it would "assume (without deciding) that the . . . question [of *whether* a statute is preemptive] must always be decided *de novo* by the courts." (*Smiley v. Citibank (South Dakota), N.A.* (1996) 517 U.S. 735, 744, 116 S.Ct. 1730, 135 L.Ed.2d 25.)

Moreover, our decision does not prohibit national banks from participating in cross-collection programs that comply with relevant laws. Further, although the Attorney General has urged us to do so, we do not decide whether

the OCC exceeded its authority in adopting the preemption regulations.[12]

Respondents refer to various materials in arguing that the OCC is aware of lenders' RAL cross-collection agreements.[13] We have examined those materials but find no clear indication that the OCC condones the use of cross-collection provisions by a "lender" who extends no credit to a consumer and seizes that consumer's tax refund to pay the proceeds to a third party lender for a preexisting RAL debt.

Because the trial court erred in concluding that federal law expressly preempted appellants' claims, we reverse the judgment and remand this matter to the trial court. Costs are awarded to appellants.

I concur: PERREN, J.

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[12] The Attorney General notes that the "California Supreme Court has categorically rejected the OCC's [previous] attempts to preempt state law by regulatory command" in *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 932, 216 Cal.Rptr. 345, 702 P.2d 503. The Attorney General further notes that Congress later referred to the *Perdue* case when it characterized the OCC's application of preemption principles as " 'inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result.' "

[13] (See, e.g., OCC Interpretative Letter No. 959 (Feb. 13, 2003); OCC Corporate Decision No.2005-11 (July 12, 2005) pp. 2-3 [application to merge First Bank of San Luis Obispo] at <http://www.occ.treas.gov/interp/aug05/cd05-11.doc/ as of Sept. 28, 2006>; OCC CRA Decision 129 (Nov. 3, 2005) pp. 1-5 [decision re HSBC Bank Nevada, N.A. application to merge, etc.] at <http://www.occ.treas.gov/interp/dec05/crad129.doc/ as of Sept. 28, 2006>.)

YEGAN, J.
I respectfully dissent.

The effect of the majority's decision is to permit a trial court in California to exercise regulatory control over the conditions under which national banks make Refund Anticipation Loans (RALs) and, acting pursuant to cross-collection agreements with other national banks, apply tax refunds deposited into special accounts to satisfy balances due on RALs made in prior tax years. Regulations adopted by the Office of the Comptroller of the Currency (OCC) preempt state laws that purport to regulate the deposit-taking and non-real estate lending activities of national banks. Here, appellants seek a state court injunction invalidating a federal banking practice approved by the OCC. In my view, the majority should stay out of the federal banking business. Because the trial court correctly concluded that appellant's claims are preempted by federal law, I would affirm.

The majority errs, in my view, when it applies a presumption *against* preemption. This is a dispute over the performance of contracts by and between federally regulated national banks. As the United States Supreme Court has noted, the presumption against preemption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." (*United States v. Locke* (2000) 529 U.S. 89, 108, 120 S.Ct. 1135, 1147, 146 L.Ed.2d 69, 88.) National banking has been the subject of federal legislation and regulation for more than a century. "Indeed, since the passage of the National Bank Act in 1864, the federal presence in banking has been significant." (*Bank of America v. City & County of San Francisco* (9th Cir.2002) 309 F.3d 551, 558; see also *Barnett Bank v. Nelson* (1996) 517 U.S. 25, 32, 116

S.Ct. 1103, 134 L.Ed.2d 237 [noting federal courts' history of interpreting statutory grants of authority to national banks as "not normally limited by, but rather ordinarily pre-empting, contrary state law."].)[1] As a consequence, "the usual presumption against federal preemption of state law is inapplicable to federal banking regulation." (*Wells Fargo Bank N.A. v. Boutris* (9th Cir.2005) 419 F.3d 949, 956.) We should presume that state laws *are* preempted and that respondents' obligations to RAL borrowers are defined by the federal regulations.

With respect to non-real estate lending, the federal regulations expressly preempt state laws purporting to regulate "terms of credit," "disbursements and repayments," "impound accounts, and similar accounts" and "[s]ecurity property." (12 C.F.R. § 7.4008(d)(2)(iv), (ix), (v), (vi).) Appellants challenge the terms under which respondents make short term loans that are secured by the borrower's expected tax refund, and respondents' seizure of tax refund checks from specially created, temporary bank accounts to repay similar loans made by other national banks in prior tax years. Their claims fall squarely within the categories of claims expressly preempted by federal law.

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[1] The OCC reached the same conclusion in its commentary on the adoption of the final rules at issue here, noting that "there is no presumption against preemption in the national bank context." (Bank Activities and Operations, 69 Fed.Reg. 1895, 1896 (Jan. 13, 2004).) Congress expressly charged the OCC with the regulation of national banks. We should defer to its reasonable interpretation of the preemptive scope of that legislative mandate. (*Tidewater Marine Western Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568, 59 Cal.Rptr.2d 186, 927 P.2d 296; see also *Presley v. Etowah County Commission* (1992) 502 U.S. 491, 508, 112 S.Ct. 820, 117 L.Ed.2d 51; *Ford Motor Credit Co. v. Milhollin* (1980) 444 U.S. 555, 100 S.Ct. 790, 63 L.Ed.2d 22.)

The OCC deposit-taking regulations also authorize national banks to employ special purpose savings services "without regard to state law limitations." (12 C.F.R. § 7.4007(b)(2)(vii).) The RAL process involves the creation of a special purpose savings account to receive the tax refund. State laws purporting to limit the terms under which those savings accounts are created or managed are expressly preempted.

Appellant's claims are not preserved by the "saving clauses" included in both the deposit-taking and non-real estate lending regulations. (12 C.F.R. §§ 7.4007, subd. (c); 7.4008, subd. (e).)[2] These general savings clauses do not control over the more specific express preemption regulations. "A general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision. . . ." (*Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 385, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157, 168.)

Moreover, each saving clause provides that state laws may "apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit taking [or non-real estate lending] powers." (12 C.F.R.

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[2] The savings clauses provide: "State laws on the following subjects are not inconsistent with the deposit-taking [or non-real estate lending] powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking [or non-real estate lending] powers: (1) Contracts; [¶] (2) Torts; [¶] (3) Criminal law; [¶] (4) Rights to collect debts; [¶] (5) Acquisition and transfer of property; [¶] (6) Taxation; [¶] (7) Zoning; and [¶] (8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking [or non-real estate lending] operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section." (12 C.F.R. §§ 7.4007, subd. (c); 7.4008, subd. (e).)

§ 7.4007, subd. (c), 7.4008, subd. (e).) State laws "incidentally affect" a national bank when they are laws of general application that "are not designed to regulate lending and do not have a disproportionate or otherwise substantial effect on lending. To the contrary, they are part of the legal infrastructure that undergird all contractual and commercial transactions." (*Gibson v. World Savings & Loan Ass'n.* (2002) 103 Cal.App.4th 1291, 1303-1304, 128 Cal.Rptr.2d 19.)

Here, appellants are using state laws of general application, including the common law tort of conversion, the Unfair Competition Law (Bus. & Prof.Code, § 17200, et seq.), the Consumers Legal Remedies Act (Civ.Code, § 1750, et seq.) and the Rosenthal Fair Debt Collection Practices Act (Civ.Code, § 1788, et seq.), to enjoin a national bank from performing under its cross-collection agreements with other national banks. This is more than an individual claim for money damages based on a breach of contract or tort. It is a class action that seeks to regulate not only the terms under which national banks make and collect on RALs, but also the manner in which they conduct business with other national banks. The remedy sought by appellants would dictate the terms under which national banks make RALs and would vitiate their cross-collection agreements. By any standard, that is more than an incidental impact on the banks' deposit-taking and non-real estate lending powers. As a result, appellants' claims fall outside the regulations' savings clauses. The trial court correctly recognized this and found appellants' claims expressly preempted by the OCC regulations. Its judgment should be affirmed.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION 6

October 26, 2006

Julia B. Strickland
Stroock & Stroock & Lavan
2029 Century Park East, Ste. 1800
Los Angeles, CA 90067-3086

HOOD, CANIEVA
Plaintiffs-Appellants

v.

SANTA BARBARA BANK & TRUST
Defendants-Respondents

BENEFICIAL NATIONAL BANK
Cross-Defendants / Respondents

CALIFORNIA ATTORNEY GENERAL
Amicus Curiae
in support of appellants

CENTER FOR RESPONSIBLE LENDING &
NATIONAL ASSOC. OF CONSUMER ADVOCATES
Amici Curiae
in support of appellants

B184489
Santa Barbara County No. 1156354

THE COURT:

Petition for rehearing is denied.

Yegan, J., would grant.

cc: All Counsel

File

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

CANIEVA HOOD, *et al.*, Plaintiffs, v. SANTA BARBARA BANK & TRUST, *et al.*, Defendants.	) Case No. 1156354)) [Assigned to the Honorable James W. Brown])) Action Filed:) March 18, 2003) Trial Date: None Set) **~~[PROPOSED]~~ ORDER**
SANTA BARBARA BANK & TRUST, *et al.* Cross-Complainants, v. HOUSEHOLD BANK, F.S.B., *et al.*, Cross-Defendants.	) **AND FINAL JUDGMENT AS TO PLAINTIFFS, DEFENDANTS SANTA BARBARA BANK & TRUST, A DIVISION OF PACIFIC CAPITAL BANK, N.A., DEFENDANT PACIFIC CAPITAL BANK, N.A., AND ALL CROSS-DEFENDANTS**)) Hearing:) Date: May 4, 2005) Time: 1:30 p.m.) Dept.: 4)) (Filed May 18, 2005)

The Motions of defendants Santa Barbara Bank & Trust, a division of Pacific Capital Bank N.A., and Pacific Capital Bank, N.A. (together, "SBBT Defendants"), and cross-defendants Beneficial National Bank, Household Bank, f.s.b., HSBC Taxpayer Financial Services Inc.,

formerly known as Household Tax Masters, Inc., JPMorgan Chase Bank, N.A., successor by merger to Bank One, NA. (Ohio), Republic First Bank, First Bank of Delaware, Republic Bank & Trust, River City Bank and First Security Bank of Mackinaw, IL (together, "Cross-Defendants") for Judgment on the Pleadings or, in the Alternative, for Summary Adjudication (the "Motions") came on regularly for hearing on May 4, 2005 in Department 4 of the Superior Court of the State of California, County of Santa Barbara, the Honorable James W. Brown, presiding.

For purposes of the Motions, the operative pleadings are Plaintiffs' Third Amended Complaint, SBBT Defendants' Answer thereto and Cross-Defendants' respective Special Answers thereto. This matter having been fully argued and considered and good cause appearing therefor, the Court hereby **GRANTS** the Motions for Judgment on the Pleadings for the reasons stated in its Tentative Ruling dated May 3, 2005, a copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference as if fully set forth. The Third Amended Complaint is hereby dismissed with prejudice as to SBBT Defendants. The Court declines to reach Defendants' and Cross-Defendants' requests in the alternative for summary adjudication and expresses no opinion on the merits of the alternative requests.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered against Plaintiffs and in favor of SBBT Defendants, and in favor of Cross-Defendants on their Special Answers, and that Plaintiffs

shall take nothing by way of the Third Amended Complaint against SBBT Defendants.

Dated: MAY 18 2005

/s/ JAMES W. BROWN
The Honorable James W. Brown
Judge of Superior Court of the
State of California
County of Santa Barbara

EXHIBIT A

Superior Court of California
Santa Barbara County

Tentative Ruling Detail

Judge James Brown
Department 4 – SB-Anacapa
1100 Anacapa Street
P.O. Box 21107
Santa Barbara, CA 93121-1107

>	**CIVIL LAW & MOTION**	
	Case Number:	**1156354**
	Caption:	**Canieva Hood et al vs Santa Barbara Bank & Trust et al**
	Hearing Date:	**Wednesday, May 04, 2005 1:30:00 PM**

Matter(s):

03-14-05 Notice of Motion and Motion by Defts Santa Barbara Bank & Trust, a Division of Pacific Capital Bank NA and Pacific Capital Bank Na for Judgment on the Pleadings or in the Alternative, for Summary Adjudication

et al – Hrg: 05/04/2005 at 1:30pm in Dept 4, Filed by Defendant Santa Barbara Bank & Trust, a Division of Pacific Capital Bank NA and Pacific Capital Bank Na

03-14-05 Notice of Motion and Motion of Cross-Defts for Judgment on the Pleadings or in the Alternative, for Summary Adjudication That Federal Preemption Bars Pltiffs et al – Hrg: 05/04/2005 at 1:30 pm in Dept 4, Filed by Cross Defendants Beneficial National Bank, f.s.b., HSBC Taxpayer Financial Services Inc., formerly known as Household Tax Masters, Inc. and JPMogran Chase Bank, N.A., successor by merger to Bank One, N.A. (Ohio)

03-23-05 Motion Application to Seal or Redact Exhibits to the Declaration of Stephen J Newman in Support of Motion of Cross Defendants for Judgment on the Pleadings or in the Alternative Motion for Summary Adjudication, Filed by Plaintiff Canieva Hood

04-13-05 Notice of Motion and Motion to Compel Pltiff to Produce all Responsive Documents to Santa Barbara Bank & Trust's First Req for Production of Documents/ Santa Barbara Bank & Trust – Hrg: 05/04/2005 at 1:30 pm in Dept 4 – NEW VOLUME #9 CREATED/TD'A, Filed by Defendant Santa Barbara Bank and Trust, a division of Pacific Capital Bank, NA.

Issues Presented:

Motion for Judgment on the Pleadings or Summary Adjudication by Santa Barbara Bank & Trust; Motion for Judgment on the Pleadings or Summary Adjudication by Beneficial National Bank et al, Federal Preemption; Motion to Seal or redact Exhibits by Plaintiff; and Motion to Compel Plaintiff to Produce Documents by Santa Barbara Bank & Trust

(Tentative) Findings:

Motion for Judgment on the Pleadings or Summary Adjudication by Santa Barbara Bank & Trust and Motion for Judgment on the Pleadings or Summary Adjudication by Beneficial National Bank et al, Federal Preemption. These motions raise overlapping issues and are directed together.

This action involves loans made against federal tax refunds ("refund anticipation loans" or "RALs"), and cross-collection of those loans. Plaintiff brings state law causes of action under the Consumer Legal Remedies Act (Cal. Civil Code §§1750 et seq) and the Unfair Competition Law (Ca. Bus & Prof. §§17200 et seq) a tort claim for conversion and a claim for declaratory relief.

Plaintiff seeks, on behalf of herself and others, to impose control over national banks' lending and deposit taking activities.

Regulation of national banks' core lending and deposit-taking functions has been committed by federal law to the OCC. [Plaintiff's claims involve two of the three core functions of the banking business, accepting deposits and making loans, and are within the subject matter of the National Bank Act and the OCC's authority. (Department of Banking & Consumer Finance v Clarke (5th Cir 1987) 809 F.2d 276, 270.

12 CFR §§7.4000, 7.4007, and 7.4008, promulgated by the Office of the Comptroller of the Currency (OCC) do expressly provide for preemption of the claims against national banks SBB&T and Beneficial National Bank. (Enabling statute 12 USC §93a; pursuant to the Supremacy Clause of the U.S. Constitution, Article VI, Congress has the power to preempt state law.) It appears from the facts alleged in the complaint that the RALs are non real estate loan products.

With respect to non real estate loan powers: "A national bank may make non-real estate loans without regard to state Law limitations concerning: . . . [ii] The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices; . . . [iv] The terms of credit . . . ; [vi] Security property . . . ; [and viii] Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents . . ." (12 C.F.R. §7.4008(b)(2)(ii), (iv), (vi), and (viii).) It appears from the facts alleged in the complaint that deposit accounts are used for the receipt of the borrower's tax refund.

With respect to deposit taking powers: "A national bank may exercise its deposit-taking powers without regard to state law limitations concerning: . . . Disclosure requirements." 12 C.F.R. §7.4007(b)(2)(iii)

Plaintiff's claims do not merely involve contract and debt collection (Bank of America v City and County of San Francisco (9th Cir 2002) 309 F.3d 551; 12 C.F.R. §§7.4007(c) and 7.4008(e)).

Section §§7.4007(c) and 7.4008(e) provide "State laws on the following subjects are not inconsistent with the [non-real estate lending] [deposit taking] powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' [non-real estate lending] [deposit taking] powers: (1) Contracts; (2) Torts; (3) Criminal law; (4) Rights to collect debts; (5) Acquisition and transfer of property; (6) Taxation; (7) Zoning; and (8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with

the powers set out in paragraph (a) of this section." Based only upon the face of the complaint it appears that the relief sought by Plaintiff would directly affect the exercise of national banks' powers. These are not mere contract, tort or debt collection claims. Plaintiff claims, on behalf of herself and others, that national banks should not have the ability to require cross-collection contracts as a risk mitigant or term of RAL credit. These matters are expressly preempted from state law limitation. (§7.4008(b)(ii) and (iv)) Plaintiff claims, on behalf of herself and others, that national banks made disclosures that were inadequate under state consumer protection law. This matter that is expressly preempted from state law. (§7.4008(b)(viii)) While Plaintiff's claims may be based upon state laws of general applicability (applying to all entities that conduct business with consumers), enforcement of those claims in the manner sought by Plaintiff would constitute direct regulation of national banks' powers.

Plaintiff seeks an injunction against requiring assent to cross-collection as a condition of RAL lending.

The visitorial powers doctrine also precludes plaintiff's claims that are brought on behalf of a class or the general public. 12 USC §484(a) and 12 CFR §7.4000(a) Plaintiff seeks state court regulation and supervision of the exercise of national baking powers. The visitorial powers doctrine gives the OCC exclusive authority to pursue such enforcement actions. Under the visitorial powers doctrine, states may not "inspect and supervise the activities of national banks and compel their adherence to a variety of state-set standards." OCC Final Rule, 2004 WL 2360332 at 8-9 (March 2004) 12 C.F.R. §7.4000 provides that "Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State

officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

. . .

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) Exceptions to the general rule. Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) Exceptions authorized by Federal law. National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to: . . .

(2) Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct

of activities authorized for national banks under Federal law. . . ."

Plaintiff's claims do not fall within the "vested in the courts of justice" exception because the purpose of this action is to regulate cross-collection agreements, not to adjudicate an individual dispute.

Because the practices at issue here are the subject of express preemption, the court does not reach the question of whether they also fall within the "catchall" preemption provisions of §7.4007(b)(1), §7.4008(b)(1), and §7.4009(b) which require a finding that the relief sought would "obstruct, impair or condition" banking operations.

§7.4007(b)(1) provides "Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks." (Emphasis supplied)

§7.4008(b)(1) provides "Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks." (Emphasis supplied)

§7.4009 provides "(a) Authority of national banks. A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) Applicability of state law. Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) Applicability of state law to particular national bank activities.

(1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:(i) Contracts; (ii) Torts; (iii) Criminal law; (iv) Rights to collect debts; (v) Acquisition and transfer of property; (vi) Taxation; (vii) Zoning; and (viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph(a) of this section." (Emphasis supplied)

Sections 7.4007(b)(2)(iii) and 7.4008(b)(2)(ii), (iv), (vi), and (viii), discussed supra, are "another OCC regulation specifically addressing the applicability of state law" to the conduct alleged in this action.

Therefore, the court does not rely on Defendants' evidence of more than an incidental effect (Declaration of Mr. Turner that $25 million in RAL delinquencies are recoverable annually through cross-collection agreements) and further discovery to respond to that evidence would not effect the court's decision (CCP §437c(h))

The Riegle-Neal Act, cited by Plaintiff, is not inconsistent with preemption here. It provides that "The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except – (i) When Federal law preempts the

application of such State laws to a national bank; . . ." 12 USC §36(f)(1)(A). Section 36(f)(1)(B) provides "The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency." In California v ARC America Corp (1989) 490 U.S. 93, the court held that Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies so state indirect purchaser claims were not preempted. The case involved the alleged fixing of the price of concrete block, not banking.

In Florida Lime & Avocado Growers, Inc. v. Paul (373 US 132, 146 a State regulation concerning marketing of avocadoes as ripe was not preempted by federal marketing orders. The court "searched in vain" for any unambiguous congressional mandate that the California state regulation was displaced by any federal regulation. "Nothing in the language of the Agricultural Adjustment Act" disclosed a comprehensive congressional design. "By its very terms, in fact, the statute purports only to establish minimum standards." (Id. at 147-148. Emphasis in original)

In Greenwood Trust Co. v Commonwealth of Massachusetts, (1st Cir. 1992) 971 F.2d 818, the court did recognize that banking and consumer protection are "within the ambit of the states' historic powers" but proceeded to state "Although this circumstance means that any preemption provision must be construed cautiously and with due regard for state sovereignty, [citation] it does not serve as a buckler against the force of the Supremacy Clause. When Congress has acted within its authority and its intent to displace state law is clear – preconditions which obtain here – preemption is not foreclosed by the fact that the federal statute intrudes into the range of subjects over which the states have traditionally exercised their police

powers." The court concluded that Plaintiff's state law claims seeking declaratory and injunctive relief based on a credit card agreement imposing fees for late monthly payments was expressly preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) § 521, 12 U.S.C. §1831(d). The federally insured bank Defendant was not subject to a state law prohibiting imposition of late fees.

In Bronco Wine Co. v. Jolly ( ) 33 Cal.4th 943, the Court held Congress had neither expressly preempted state authority with respect to regulation of wine and the Plaintiff did "not contend otherwise." The Court declined to find implied preemption in view of traditional police powers of the states to protect consumers from deception in the marketing of food and beverages. A presumption against preemption applied because "the protection of consumers from potentially misleading brand names and labels of food and beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states." (Id. at 959)

In Atherton v FDIC (1997) 519 U.S. 213, an action brought in the name of a federally chartered bank (that had gone into receivership) against several of its officers and directors claiming they caused the bank to enter into bad loans negligently and in breach of their fiduciary duties under state law were not preempted. 12 USC §1821 authorized federal actions for gross negligence against directors, but did not preempt state claims for simple negligence. Congress intended §1821 as a floor, not a ceiling for liability. Section 1821 contained no express preemption language.

In Bank of America v City and County of San Francisco (9th Cir 2002) 309 F.3d 551, the court held that a presumption against preemption is not triggered when the

state regulates in field with a history of significant federal presence, and that national banking is such a field. Federal regulations permitting federal associations to charge ATM fees to nondepositors preempted the ordinances from prohibiting federal savings associations from charging such fees. "State regulation of banking is permissible when it 'does not prevent or significantly interfere with the national bank's exercise of its powers.' Thus, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law. n3 Nevertheless, because there has been a "history of significant federal presence" in national banking, the presumption against preemption of state law is inapplicable." (Id. at 558-559) Branick v Downey Savings and Loan Ass'n (2005) 126 Cal.App.4th 828, 839 is not citeable. It was superseded by grant of review April 27, 2005. (CRC Rules 976, 977)

In Gibson v. World Savings (2002) 103 Cal.App.4th 1291, a state law UCL class action that claimed the Savings & Loan Association charged borrowers more for replacement hazard insurance than authorized by the terms of the governing deeds of trust, and misrepresented the cost of the replacement insurance was not preempted by 12 CFR §560.2. "While it is true that section 560.2(b)(2) preempts state laws imposing requirements regarding the ability of savings associations to require or obtain insurance on loan collateral, it does not follow those lenders are free to charge whatever they wish for the insurance they purchase. While state law cannot prescribe limits on the premiums to be charged, the parties can agree to contractual terms that place certain restrictions on those premiums. And if the parties have done so, the courts of this state can interpret and enforce those contractual

limitations without impinging upon the preempted field of regulation." Id. at 1306. In Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 938, the Court stated, "The assertion in the regulation that state laws limiting bank service charges 'are preempted by the comprehensive federal statutory scheme governing the deposit-taking function of national banks' (12 C.F.R. § 7.8000, subd. (c)) is palpably erroneous. There is no comprehensive federal statutory scheme governing the taking of deposits. There is one relevant statute, section 24 of the National Bank Act, and that merely authorizes banks to accept deposits. Section 24 may by implication also authorize banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposit, but such implied authority does not constitute a regulatory scheme so comprehensive as to displace state law." However, the regulations discussed above were not in existence at the time Perdue was decided. Sections 7.4007 and 7.4008 concerning preemption were added January 13, 2004. (69 Fed. Reg. 1904, 1916. Effective February 12, 2004) "Preemption may result, not only from action taken by Congress itself, but also from action by a federal agency. [Citation] A regulation's preemptive effect 'does not depend on express congressional authorization to displace state law.'" Gibson v World Savings & Loan Association (2002) 103 Cal.App.4th 1291, 1297. The Summary to that Amendment provides, "The Office of the Comptroller of the Currency (OCC) is publishing a final rule amending parts 7 and 34 of our regulations to add provisions clarifying the applicability of state law to national banks' operations. The provisions concerning preemption identify types of state laws that are preempted, as well as the types of state laws that generally are not preempted, with respect to national banks' lending, deposit-taking, and other

operations. In tandem with these preemption provisions, we are also adopting supplemental anti-predatory lending standards governing national banks' lending activities." While it is possible that the California Supreme Court would extend its holding in Perdue to apply to use of cross-collection agreements as a required risk mitigation term in RALs, notwithstanding the recent addition of sections 7.4007 and 7.4008, this trial court is confronted with the express OCC regulations that appear on their face to expressly preempt state regulation of such matters.

Preemption does not leave the alleged conduct unregulated. As Plaintiff points out, the OCC regulations prohibit national banks from engaging in unfair or deceptive practices. (12 CFR §7.4008(c); 15 USC 45(a)(1))

Motion to Seal or Redact Exhibits by Plaintiff

The Stephen J. Newman in Support of Motion of Cross-Defendants for Judgment on the Pleadings or in the Alternative for Summary Adjudication, was conditionally filed under seal 03-14-05.

Good cause appears to seal four exhibits to it, Exs. B, D, E and F.

There exists an overriding interest that overcomes the right of public access to these records. The information is protected by Plaintiff's privacy interests (Cal. Const. Art I, §1). It contains her personal identifying information including her social security number, home telephone number, home address, date of birth, driver's license number, and former home address, as well as personal private information concerning a third party relative of plaintiff's.

This overriding interest supports sealing the record. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed. Plaintiff asserts genuine concerns regarding identity theft. The

sealing is narrowly tailored, applying only to Exhibits B, D, E and F. No less restrictive means exist to achieve the overriding interest
No opposition to the request to seal is on file.

Motion to Compel Plaintiff to Produce Documents by Santa Barbara Bank & Trust
Plaintiff's 1994, 2000, 2001, 2002 and 2003 federal income tax returns are directly relevant to her claims herein. Disclosure is necessary to a fair and just resolution. Plaintiff has produced her 2002 return. The 1994, 2001 and 2003 returns are directly relevant to prove or disprove Plaintiff's claims concerning the cross-collected Beneficial RAL (1995, based on 1994 return) and Defendant's claim that Plaintiff enjoyed a windfall with respect to that RAL, and to determine her suitability as a class representative. The 2000 returned is directly relevant because it was prepared by Defendant Jackson Hewitt and Plaintiff has raised as an issue in this case the manner in which JH prepares such returns. The returns for 1995, 1996, 1997, 1998, and 1999 do not appear to be directly relevant. Exploration of Plaintiffs "Strategy in managing her tax obligations" alone is not sufficient to override her taxpayer's privilege with respect to these years.

{Tentative} Ruling:
Motion for Judgment on the Pleadings or Summary Adjudication by Santa Barbara Bank & Trust
GRANTED
Motion for Judgment on the Pleadings or Summary Adjudication by Beneficial National Bank et al, Federal Preemption
GRANTED
Motion to Seal or redact Exhibit by Plaintiff

GRANTED. Exhibits B, D, E and F to the Stephen J. Newman in Support of Motion of Cross-Defendants for Judgment on the Pleadings or in the Alternative for Summary Adjudication, conditionally filed under seal 03-14-05, shall be sealed. All other portions of the document shall be included in the public file. Rule 243.1(e)(1)(ii)
Motion to Compel Plaintiff to Produce Documents by Santa Barbara Bank & Trust
The Motion is GRANTED in part and DENIED in part. Plaintiff shall produce all documents responsive with respect to her 1994, 2000, 2001, 2002 and 2003 federal tax returns only.

Court of Appeal, Second Appellate District,
Div. 6 – No. B184489
S147931

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jan. 3, 2007)

CANIEVA HOOD et al., Plaintiffs and Appellants,

v.

SANTA BARBARA BANK & TRUST et al.,
Defendants and Respondents.

The request for judicial notice, filed November 27, 2006, is granted.
Petition for review DENIED.
The request for an order directing depublication of the opinion is denied.

Werdegar, J., was recused and did not participate.
Corrigan, J., was absent and did not participate.

GEORGE
Chief Justice

U.S.C.A. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

---

12 U.S.C. § 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. . . .

* * *

---

12 U.S.C. § 93a. Authority to prescribe rules and regulations

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

---

12 U.S.C. § 484. Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

---

12 C.F.R. § 7.4000 Visitorial powers.

(a) *General rule.*

(1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub.L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(c) *Report of examination.* The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.

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12 C.F.R. § 7.4007 Deposit-taking.

(a) *Authority of national banks.* A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Applicability of state law.*

(1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.

(2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:

(i) Abandoned and dormant accounts;[3]

(ii) Checking accounts;

(iii) Disclosure requirements;

(iv) Funds availability;

(v) Savings account orders of withdrawal;

(vi) State licensing or registration requirements (except for purposes of service of process); and

(vii) Special purpose savings services;[4]

(c) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[5]

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[3] This does not apply to state laws of the type upheld by the United States Supreme Court in *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944), which obligate a national bank to "pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business." *Id.* at 248-249.

[4] State laws purporting to regulate national bank fees and charges are addressed in 12 CFR 7.4002.

[5] But see the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * * . But it is without lawful power to make

(Continued on following page)

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

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12 C.F.R. § 7.4008 Lending.

(a) *Authority of national banks.* A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Standards for loans.* A national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant

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such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) *Unfair and deceptive practices.* A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this § 7.4008.

(d) *Applicability of state law.*

(1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

(i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(iii) Loan-to-value ratios;

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(v) Escrow accounts, impound accounts, and similar accounts;

(vi) Security property, including leaseholds;

(vii) Access to, and use of, credit reports;

(viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(ix) Disbursements and repayments; and

(x) Rates of interest on loans.[6]

(e) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[7]

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

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[6] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

[7] *See supra* note 5 regarding the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States."

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

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12 C.F.R. § 7.4009 Applicability of state law to national bank operations.

(a) *Authority of national banks.* A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) *Applicability of state law.* Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) *Applicability of state law to particular national bank activities.*

(1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

(i) Contracts;

(ii) Torts;

(iii) Criminal law[8]

(iv) Rights to collect debts;

(v) Acquisition and transfer of property;

(vi) Taxation;

(vii) Zoning; and

(viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

Cal. Bus. & Prof. Code § 17200

Unfair competition; prohibited activities

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

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[8] 8 *Id.*

Cal. Bus. & Prof. Code § 17203

Injunctive Relief – Court Orders[1]

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with *Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

Cal. Bus. & Prof. Code § 17204

Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys[1]

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district

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[1] Section caption supplied by Prop. 64.

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attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.

Cal. Civ. Code § 1770

List of proscribed practices

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

* * *

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

* * *

(14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

* * *

(19) Inserting an unconscionable provision in the contract.

* * *

Cal. Civ. Code § 1788.13

Misrepresentations in communications; unlawful practices

No debt collector shall collect or attempt to collect a consumer debt by means of the following practices:

* * *

(i) The false representation of the true nature of the business or services being rendered by the debt collector;

* * *

Cal. Civ. Code § 1788.30

Liability of debt collector; individual action; actual and punitive damages; costs; cure of violation; venue; defenses

(a) Any debt collector who violates this title with respect to any debtor shall be liable to that debtor only in an individual action, and his liability therein to that debtor shall be in an amount equal to the sum of any actual damages sustained by the debtor as a result of the violation.

(b) Any debt collector who willfully and knowingly violates this title with respect to any debtor shall, in addition to actual damages sustained by the debtor as a result of the violation, also be liable to the debtor only in an individual action, and his additional liability therein to that debtor shall be for a penalty in such amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000).

(c) In the case of any action to enforce any liability under this title, the prevailing party shall be entitled to costs of the action. Reasonable attorney's fees, which shall be based on time necessarily expended to enforce the liability, shall be awarded to a prevailing debtor; reasonable attorney's fees may be awarded to a prevailing creditor upon a finding by the court that the debtor's prosecution or defense of the action was not in good faith.

(d) A debt collector shall have no civil liability under this title if, within 15 days either after discovering a violation which is able to be cured, or after the receipt of a written notice of such violation, the debt collector notifies the debtor of the violation, and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor.

(e) A debt collector shall have no civil liability to which such debt collector might otherwise be subject for a violation of this title, if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation.

(f) Any action under this section may be brought in any appropriate court of competent jurisdiction in an individual capacity only, within one year from the date of the occurrence of the violation.

(g) Any intentional violation of the provisions of this title by the debtor may be raised as a defense by the debt collector, if such violation is pertinent or relevant to any claim or action brought against the debt collector by or on behalf of the debtor.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

CANIEVA HOOD and CONGRESS OF CALIFORNIA SENIORS, Plaintiffs, vs. SANTA BARBARA BANK & TRUST and PACIFIC CAPITAL BANK, NA., a California corporation, CENDANT CORPORATION, a Delaware corporation, JACKSON-HEWITT, INC., a Virginia corporation, TAX SERVICES OF AMERICA,	) CASE NO. 1156354)) **CLASS ACTION**)) **THIRD AMENDED COMPLAINT FOR VIOLATIONS OF CONSUMER LEGAL REMEDIES ACT, ROBBINS-ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT, BUSINESS & PROFESSIONS CODE §§ 17200 *et seq.*, CONVERSION, AIDING & ABETTING,**

a Delaware corporation, d.b.a. JACKSON-HEWITT TAX SERVICE, and DOES 3 through 20, inclusive, Defendants.	) **AND DECLARATORY**) **RELIEF**) DEMAND FOR) JURY TRIAL) (Filed Sep. 9, 2004)

INTRODUCTION

Plaintiffs Canieva Hood and Congress of California Seniors, by their attorneys, bring this action to challenge Defendants' unlawful and unfair practice of seizing consumers' tax refunds to repay debts owed to other third-party lenders without prior consent, permission or authorization. In the alternative, Plaintiffs challenge Defendants' practice of misleading consumers into entering into loan agreements that permit Defendants to seize tax refunds for debt collection purposes. Plaintiffs seek compensatory and punitive damages, injunctive relief, and attorneys' fees, costs and expenses.

JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to California Civil Code §§ 1780 and 1781, Civil Code § 1788.30 and Business and Professions Code §§ 17203 and 17204.

This Court has personal jurisdiction over Defendant Pacific Capital Bank, N.A., also doing business as Santa Barbara Bank & Trust, as it is a California corporation.

This Court has personal jurisdiction over defendant Cendant Corporation, defendant Jackson Hewitt, Inc. and defendant Tax Services of America, Inc. d.b.a. Jackson Hewitt Tax Service, as all defendants do business

throughout California. Cendant Corporation, Jackson Hewitt, Inc. and Tax Services of America, Inc. have offices and/or franchises in California.

THE PARTIES

1. Plaintiff Canieva Hood ("Hood") is a natural person and a resident of Los Angeles, California. Hood is employed as an administrative assistant. She supports two children and her mother. She has received the Earned Income Tax Credit from the Internal Revenue Service ("IRS") during approximately the past nine (9) years.

2. The Congress of California Seniors (hereafter "CCS") is located in Sacramento, California. Established in 1977, CCS is a statewide nonprofit education and advocacy organization dedicated to improving the life of seniors and their families. CCS is an affiliate of the Alliance for Retired Americans, which was established eighteen (18) years ago for the purposes of representing the interests of the elderly throughout California.

3. Defendant Pacific Capital Bank, N.A. is a national banking association with its principal place of business in Santa Barbara, California. Pacific Capital Bank, N.A. is chartered by the Office of the Comptroller of Currency. Santa Barbara Bank & Trust is a division of Pacific Capital Bank, N.A. (Pacific Capital Bank, N.A. and Santa Barbara Bank & Trust hereinafter will be jointly referred to as "SBBT"). Among other functions, SBBT is engaged in the business of making refund anticipation loans ("RALs") to consumers. It does so by working in conjunction with businesses engaged in tax preparation services throughout the United States.

4. Defendant Cendant Corporation ("Cendant"), previously named herein as Doe 1, is a Delaware corporation with its principal place of business in New York, New York. Cendant owns, controls and operates defendant subsidiaries Jackson Hewitt, Inc. and Tax Services of America, Inc.

5. Defendant Jackson Hewitt, Inc. ("JH") is a Virginia corporation with its principal place of business in Parsippany, New Jersey. It is a subsidiary of Cendant Corporation.

6. Defendant Tax Services of America, Inc. ("TSA"), previously named herein as Doe 2, is a Delaware corporation with its principal place of business in Parsippany, New Jersey. It is a subsidiary of Cendant Corporation. TSA is authorized to do business in California as Jackson Hewitt Tax Service.

7. Defendants Cendant, JH and TSA are engaged in the business of tax preparation. Defendants Cendant, JH and TSA, through their officers, agents, and employees are engaged in and sell tax preparation services to the general public, and are doing such business in California with offices and/or franchises located throughout California. As part of these tax preparation services, defendants Cendant, JH and TSA offer RALs through SBBT to consumers.

8. Plaintiffs are informed and believe and on that basis allege that the tax preparation and RAL services are carried out pursuant to standard and customary practices, policies and procedures which are developed and implemented by Cendant, JH and/or TSA to govern the daily operation of company and independently-owned franchise locations. Plaintiffs are further informed and believe and on that basis allege that defendants Cendant, JH and/or

TSA direct, support and control the business practices of individual offices and/or franchises located throughout California.

9. Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as Does 3-20, and therefore sues these Defendants by such fictitious names. Plaintiffs are informed and believes that each of the fictitiously named Defendants, including any such Defendants that may be the agents, representatives, or parent or subsidiary corporations of the named Defendants, is responsible in some manner for the occurrences, events, transactions, and injuries alleged herein, and that the harm suffered by the persons Plaintiffs represent and by the general public as hereinafter set forth were proximately caused by said Defendants. Plaintiffs will amend this complaint to state the true names and capacities of said Doe Defendants when ascertained.

10. Plaintiffs are informed and believes and thereon alleges that each of the Defendants, including the Doe Defendants, acted in concert with each and every other Defendant, intended to and did participate in the events, acts, practices and courses of conduct alleged herein, and was a proximate cause of damage and injury thereby to Plaintiffs as alleged herein.

11. At all times herein mentioned, each Defendant was the agent or employee of each of the other Defendants and was acting within the course and scope of such agency or employment.

CLASS ALLEGATIONS

12. Pursuant to California Civil Code § 1781 and California Code of Civil Procedure § 382, Plaintiff Hood brings this action on behalf of herself and all other persons similarly situated. The class that Plaintiff Hood represents (hereinafter the "Plaintiff Class") is composed of all persons who, at any time from March 18, 1999 forward, will have or have had their refunds seized by SBBT as a result of the conduct challenged by this action.

13. The Plaintiff Class includes a subclass, referred to herein as the "California Subclass" that Plaintiff Hood represents against Cendant, JH and TSA, and that is composed of all California residents who, at any time from March 18, 1999 forward, will have or have had their refunds seized by SBBT as a result of the conduct challenged by this action.

14. The Plaintiff Class includes a second subclass, referred to herein as the "No Contract Subclass," that Plaintiff Hood represents against SBBT, and that is composed of all those members of the Plaintiff Class who had their RAL Application/Agreements rejected by SBBT, did not receive an "Accelerated Check Refund" from SBBT, and had their refunds seized by SBBT.

15. The Plaintiff Class also includes a third subclass, referred to herein as the "California No Contract Subclass," that Plaintiff Hood represents against Cendant, JH and TSA and that is composed of all those members of the Plaintiff Class who had their RAL Application/Agreements rejected by SBBT, did not receive an "Accelerated Check Refund" from SBBT, and had their refunds seized by SBBT.

16. Plaintiff Hood is informed and believes and on that basis alleges that the Plaintiff Class is so numerous that joinder of all members would be impracticable. The exact size of the Plaintiff Class and the subclasses, and the identity of the members of the class and the subclasses are ascertainable from the business records of Defendants.

17. Questions of law and fact common to the Plaintiff Class and the subclasses exist that predominate over questions affecting only individual members, including, *inter alia*, the following:

(a) whether Defendants have violated Civil Code § 1770(a)(5) by representing that RALs are a form of tax refund when they are, in fact, loans subject to seizure by the lender to pay off prior alleged RAL debts of individual taxpayers;

(b) whether Defendants have violated Civil Code § 1770 (a)(14) by representing that they have rights and remedies that are prohibited by law, specifically that they have the right to collect the third party debt without providing notices required by law; and

(c) whether Defendants have violated Civil Code § 1770(a)(19) by including a provision authorizing cross-lender debt collection in their RAL Application/ Agreements and whether without discussion or negotiation Defendants standardized the form contracts, drafted solely by them.

18. The claims asserted by Plaintiff Hood in this action are typical of the claims of the members of the Plaintiff Class and all subclasses as described above, the claims arise from the same course of conduct by Defendants, and the relief sought is common.

19. Plaintiff Hood will fairly and adequately represent and protect the interests of the members of the Plaintiff Class and all subclasses. Plaintiff Hood has retained counsel who are competent and experienced in both consumer protection and class action litigation.

20. For class claims alleged under California Code of Civil Procedure § 382, a class action is superior to other methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. Furthermore, because the economic damages suffered by the individual class members may be relatively modest, albeit significant, compared to the expense and burden of individual litigation, it would be impracticable for members of the Plaintiff Class to seek redress individually for the wrongful conduct alleged herein. There will be no undue difficulty in the management of this litigation as a class action.

PRIVATE ATTORNEY GENERAL ALLEGATIONS

21. This action is brought by Plaintiffs acting as private attorneys general pursuant to the Unfair Competition Law, Business and Professions Code §§17200 *et seq.* Pursuant to Business and Professions Code §§17203 and 17204, a private attorney general action is appropriate and necessary because SBBT has engaged in the acts described herein as a general business practice. Plaintiffs request that this Court decide that SBBT's practice of seizing tax refunds for debt collection purposes without the voluntary and knowing consent of consumers is unlawful, unfair, deceptive and unenforceable, and enjoin SBBT from engaging in this practice. Plaintiffs also request that this Court decide that SBBT's imposition of a contract

provision permitting this debt collection practice is unlawful, unfair, deceptive and unenforceable, and enjoin SBBT from engaging in this practice.

FACTUAL ALLEGATIONS

22. On January 31, 2002, Hood went to a Jackson Hewitt Tax Service office in Trotwood, Ohio office to have her taxes prepared. Hood inquired into the option of getting her refund quickly.

23. A Jackson Hewitt Tax Service employee informed Hood about two options for getting her refund quickly, either the next day or in 48 hours. The Jackson Hewitt Tax Service employee did not inform Hood that both the next day and the 48 hour options actually were loans. Instead, the Jackson Hewitt Tax Service employee characterized these options using the words "rapid refund." The employee also did not inform Hood that the loan agreement contained a provision allowing SBBT to seize her refund if she had any prior RAL debts outstanding, including debts owed to other RAL lenders.

24. Hood chose the RAL that would be received in 48 hours. Hood did not realize that she was taking out a loan or that in seeking a "rapid refund," she might be agreeing to let SBBT take her refund to repay any outstanding RAL debts.

25. After preparing her tax returns, the Jackson Hewitt Tax Service employee instructed Hood to sign and initial a set of documents. Hood did not have an opportunity to read the documents.

26. In the stack of documents signed by Hood, there was a loan application and agreement for a RAL. Paragraph 6.a. of the RAL Application/Agreement includes a Cross Lender Debt Provision which states:

> COLLECTION OF DELINQUENT RAL You authorize JH and SBBT to exchange information about your current and prior RALs with other RAL lenders including Bank One, N.A., Beneficial National Bank/Household Bank, First Security Bank, River City Bank, County Bank of Rehobeth Beach, DE and Republic Bank & Trust Company/Refunds Now. If you have delinquent RALs from prior years with SBBT or any or one more of these lenders that have not been discharged in bankruptcy, you will not be eligible for a RAL but will instead receive an ACR. Upon receipt of your tax refund, you authorize SBBT to deduct from the Account, after deducting the applicable fees as set forth in Section 2 above, the total amount due on the prior year RALs and forward such amount to the appropriate RAL lender(s) prior to disbursing the balance of the Account to you.

A copy of the loan agreement is attached as Exhibit 1.

27. On Saturday, February 9, Hood received a letter from Defendant SBBT stating that her RAL was denied because SBBT had been informed of an outstanding RAL debt with Household Bank. The letter also stated that if the IRS sent Hood's refund to SBBT, those funds would be used to satisfy the outstanding RAL debt. A copy of this letter is attached as Exhibit 2.

28. Hood never received her tax refund. Upon information and belief, Hood's refund was seized by SBBT and paid to Household Bank to satisfy an outstanding

RAL debt. Hood also never received or was offered an "Accelerated Check Refund" ("ACR"). Upon information and belief, the ACR is a non-RAL product that represents a consumer's tax refund minus the tax preparation and ACR fees.

29. Subsequently, Hood contacted a legal services program in Ohio seeking assistance. In June 2002, an attorney from the Equal Justice Foundation in Ohio sent letters on Hood's behalf to Defendant SBBT and Household Bank requesting disclosure of the information upon which SBBT relied in denying Hood's application. Copies of the responses from SBBT and Household Bank are attached as Exhibits 3 and 4.

30. Because of the loss of her tax refund, Hood was unable to pay her rent and received an eviction notice. Hood is still experiencing financial difficulties because of the loss of her tax refund.

SBBT's RAL PROGRAM

31. A refund anticipation loan is a short term loan secured by a consumer's expected tax refund. RALs loan are usually *not* made by the tax preparer, but by a separate lender, usually a bank such as SBBT.

32. Pacific Capital Bank's filings with the Securities and Exchange Commission state that the company earned $26.4 million in gross income from RAL fees in 2001.

33. Upon information and belief, when SBBT makes a RAL, it prepares to collect on the loan by opening a temporary bank account to receive electronic deposit of the refund. The documents signed by the consumer instruct the IRS to direct deposit the refund into that account.

SBBT is repaid when the consumer's refund appears in the temporary bank account.

34. Upon information and belief, if the consumer's refund is not deposited into the temporary bank account or is less than expected, the bank will hold the consumer liable for the full amount of the RAL plus late fees.

35. Upon information and belief, there are only a handful of banks that make refund anticipation loans. The three banks that control most of the RAL market are Household Bank, Bank One and Defendant SBBT. Other banks that make RALs include Republic Bank & Trust (d.b.a. Refunds Now) and River City Bank.

36. Upon information and belief, banks that make RALs, including SBBT and Household Bank, have entered into a cooperative agreement with each other to collect back debts from RAL customers. RAL lenders include a provision their RAL Application/Agreements to implement this cooperative agreement.

FIRST CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND DAMAGES

(Violation of Consumer Legal Remedies Act, California Civil Code §§ 1750, *et seq.*, Asserted on Behalf of Plaintiff Hood, the Plaintiff Class, and the California Subclass Against All Defendants Except JH as to Damages)

37. Hood realleges and incorporates herein as though set forth in full, the allegations of paragraphs 1 through 36 above.

38. Hood brings this action on her behalf and on behalf of the Plaintiff Class and the subclasses seeking

injunctive relief and damages pursuant to the Consumer Legal Remedies Act (CLRA), California Civil Code §§ 1750 *et seq.* California Civil Code § 1770(a)(5) specifically prohibits representations that services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have. California Civil Code §1770(a)(14) specifically prohibits representations that a transaction confers or involves rights, remedies, or obligations which it does not have or involve or which are prohibited by law. California Civil Code § 1770(a)(19) prohibits insertion of an unconscionable provision in a contract.

39. The CLRA specifically provides that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ. Code § 1751.

40. Defendants have violated California Civil Code § 1770(a)(5) because they have represented that the RALs are a form of tax refund when they are loans subject to seizure by the lender to pay off alleged prior RAL debts of individual taxpayers.

41. Defendants have violated § 1770(a)(14) of the Act by representing that they have rights and remedies that are prohibited by law, specifically that they have the right to collect a third party debt without providing notices required by law.

42. Defendants have violated § 1770(a)(19) of the Act by including the SBBT Cross-Lender Debt Collection Provision in their RAL Application/Agreements. Defendants possess bargaining strength and power far superior to that of Hood and other customers. Without discussion or negotiation, Defendants offer standardized form contracts,

drafted by Defendants, which are contracts of adhesion because they are offered on a take-it-or-leave-it basis.

43. The Cross-Lender Debt Collection Provision is substantially one-sided in favor of Defendants. There is no consideration for the SBBT Cross-Lender Debt Collection Provision. It is, therefore, unlawful, unfair, fraudulent and unconscionable.

44. The Cross-Lender Debt Collection Provision does not fall within the reasonable expectations of Hood or of Defendants' other customers, and is unduly oppressive. It is, therefore, unlawful, unfair, fraudulent and unconscionable.

45. The Cross-Lender Debt Collection Provision unlawfully, unfairly and fraudulently deprives Hood and the Defendants' other customers of their tax refunds without their voluntary, knowing and intelligent consent.

46. On April 1, 2003, Hood, through her counsel, sent notice and demand letters by certified mail, return receipt, to Pacific Capital Bank, N.A, and Santa Barbara Bank & Trust, and to Tax Services of America, Inc., d.b.a. Jackson Hewitt Tax Service, pursuant to California Civil Code § 1782.

47. On May 2, 2003, counsel for Hood received a letter from Santa Barbara Bank & Trust declining to take any of the corrective action demanded. Plaintiff did not receive a response from TSA.

48. On May 14, 2004, Hood, through her counsel, sent notice and demand letters by certified mail, return receipt, to Cendant Corporation, pursuant to California Civil Code § 1782. To date, Cendant Corporation has failed

to respond in any way to Plaintiff's May 14, 2004 notice, pursuant to California Civil Code § 1782.

49. On May 26, 2004, Hood, through her counsel, again sent notice and demand letters by certified mail, return receipt, to Tax Services of America, Inc., d.b.a. Jackson Hewitt Tax Service, pursuant to California Civil Code § 1782. To date, TSA has failed to respond in any way to Plaintiff's May 26, 2004 notice pursuant to California Civil Code § 1782.

50. As a result of the unfair and deceptive acts and practices of Defendants herein above described, plaintiff Hood and members of the Plaintiff Class and subclasses have suffered substantial economic losses in an amount to be proven at trial.

51. As a result of the unfair and deceptive acts and practices of Defendants herein above described, members of the Plaintiff Class and subclasses who are senior citizens or disabled individuals have suffered substantial economic or emotional, and are entitled to special damages in accordance with California Civil Code § 1780(b).

52. Pursuant to California Civil Code §§ 1770 and 1780, Hood and each member of the Plaintiff Class and subclasses she seeks to represent are entitled to recover actual damages against Defendants SBBT and JH sustained as a result of Defendants' violations of the CLRA. Such damages include, without limitation, the amount of any federal tax refund seized by the Defendants, other resulting monetary losses and damages, applicable statutory damages, and emotional distress suffered by Hood and other class members, which damages are in an amount to be proven at trial.

53. Pursuant to California Civil Code § 1780, Hood and each member of the Plaintiff Class and subclasses she seeks to represent are entitled to recover punitive damages against Defendants SBBT and JH because Defendants acted with malice, oppression or fraud.

54. Pursuant to California Civil Code §§ 1780 and 1781, plaintiff Hood and the Plaintiff Class hereby request certification of the Plaintiff Class, injunctive relief, restitution, damages according to proof, and attorneys' fees, costs and expenses pursuant to California Civil Code § 1780(d) and California Code of Civil Procedure § 1021.5.

SECOND CAUSE OF ACTION FOR DAMAGES AND PENALTIES

(Violation of the Robbins-Rosenthal Fair Debt Collection Practices Act; Asserted on behalf of Plaintiff Hood Against All Defendants)

55. Hood realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 through 54 above.

56. The Robbins-Rosenthal Fair Debt Collection Practices Act (Robbins-Rosenthal Act), Civil Code §§ 1788 *et seq.*, prohibits unfair and deceptive acts and practices in the collection of consumer debts.

57. By their acts and practices as hereinabove described, Defendants have violated the Robbins-Rosenthal Act as follows, without limitation:

(a) In failing to inform consumers that SBBT would engage in debt collection practices during the loan application and approval process, Defendants have violated § 1788.13(i), which prohibits the false representation

of the true nature of the business or services being rendered by the debt collector. Defendants have represented SBBT as a lender but have failed to disclose the material fact that it is acting as a debt collector with respect to the same transaction.

(b) By failing to include certain debt collection notices required by law.

58. Pursuant to § 1788.30 of the Robbins-Rosenthal Act, Hood is entitled to recover her actual damages sustained as a result of Defendants' violations of the Robbins-Rosenthal Act. Such damages include, without limitation, the amount of her federal tax refund seized by SBBT, other resulting monetary losses and damages, and emotional distress suffered by Hood, which damages are in an amount to be proven at trial.

59. In addition, because Defendants' violations of the Robbins-Rosenthal Act were committed willingly and knowingly, Hood is entitled to recover, in addition to her actual damages, penalties of at least $1,000 per violation as provided for in the Act.

60. Pursuant to § 1788.30(c) Robbins-Rosenthal Act, Hood is entitled to recover all attorneys' fees, costs and expenses incurred in the bringing of this action.

THIRD CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND RESTITUTION

(Violation of the Unfair Competition Law, California Business and Professions Code §§ 17200, *et seq.*, Brought by All Plaintiffs Against All Defendants)

61. Plaintiffs reallege and incorporate herein by this reference each and every allegation set forth in paragraphs 1 through 60 above.

62. Plaintiffs, as private attorneys general, challenge Defendants' practice of cross-lender debt collection and inclusion of the SBBT Cross-Lender Debt Collection Provision in the RAL Application/Agreement.

63. The Unfair Trade Practices Act defines unfair competition to include any "unlawful," "unfair" or "fraudulent" business act or practice. Bus. and Prof. Code § 17200.

64. Defendants' practices are unlawful, unfair and fraudulent business practices for the reasons set forth below, without limitation:

(a) The practice of cross-lender debt collection and the inclusion of the Cross-Lender Debt Collection Provision in RAL Agreements violate the Consumer Legal Remedies Act, Civil Code §§ 1770(a)(5), 1770 (a)(14) and (a)(19);

(b) The practice of cross-lender debt collection violates the Robbins-Rosenthal Act;

(c) The practice of cross-lender debt collection and the inclusion of the Cross-Lender Debt Collection Provision in RAL Agreements offends public policy, is unconscionable, is oppressive and unscrupulous, and causes substantial injury to consumers; and

(d) Defendants deceive and mislead consumers when they induce consumers to sign RAL Agreements containing the Cross-Lender Debt Collection Provision, because consumers are not clearly and effectively informed about the existence and effect of the SBBT Cross-Lender Debt Collection Provision.

65. Pursuant to Business and Professions Code §§ 17200, *et seq.*, Plaintiffs are entitled to enjoin the

practice of cross-lender debt collection and to obtain restitution of all funds obtained by Defendants by reason of and through the use of these unlawful, unfair and fraudulent acts and practices.

66. Pursuant to Business and Professions Code § 17203, Plaintiffs, individually, and on behalf of all members of the general public who are, have been or may be, subjected to the unlawful, unfair, and fraudulent practices of Defendants, hereby request injunctive relief prohibiting these practices in the future, and such other orders as may be necessary to restore to any person in interest, any money or property, real or personal, which may have been acquired by Defendants by means of this unlawful, unfair and fraudulent business practice, or to disgorge profits Defendants have earned thereby.

67. Pursuant to Code of Civil Procedure § 1021.5, Plaintiffs are entitled to recover their reasonable attorney's fees, costs and expenses incurred in bringing this action.

FOURTH CAUSE OF ACTION FOR DAMAGES
(Conversion, Asserted on Behalf of Plaintiff Hood, the No Contract Subclass, and the California No Contract Subclass Against Defendants SBBT and JH)

68. Plaintiffs reallege and incorporate herein by this reference each and every allegation set forth in paragraphs 1 through 67 above.

69. Defendants did not have a valid contract with Subclass members because they rejected the Subclass members' applications for RALs and did not give them ACRs. No contract was formed.

70. In the alternative, there was no consideration for the SBBT Cross-Lender Debt Collection Provision. It is, therefore, unlawful, unfair, fraudulent and unconscionable, and of no legal effect.

71. Because the contract and/or SBBT Cross-Lender Debt Collection Provision are null, void and of no legal effect, Defendants unlawfully, wrongfully and fraudulently exercised dominion and control over the property of the Subclass.

72. Defendants knowingly deprived the Subclass of the beneficial use of their property by these actions, and have committed the common law tort of conversion.

73. Defendants intentionally took possession of or prevented Subclass members' access to their property, namely, their tax refunds, and failed to return such property. There was no valid consent to Defendants' possession because no contract was formed. Such possession resulted in significant harm to Subclass members.

74. Subclass members are entitled to recover their actual damages sustained as a result of Defendants' conversion. Such damages include, without limitation, the amount of the Subclass members' federal tax refunds seized by Defendants, interest from the time of the conversion, and other resulting monetary losses and damages, which damages are in an amount to be proven at trial.

75. Subclass members are also entitled to recover punitive damages because Defendants' conduct constituting conversion was done with malice, oppression or fraud.

FIFTH CAUSE OF ACTION
(Aiding and Abetting, Brought By All Plaintiffs
Against Defendants Cendant, JH, and TSA)

76. Plaintiffs reallege and incorporate herein by this reference each and every allegation set forth in paragraphs 1 through 75 above.

77. Cendant, JH, and TSA knew or realized that the other Defendants were engaging in or planned to engage in the unlawful acts, as more particularly alleged above. Knowing or realizing that SBBT and other Defendants were engaged in the unlawful conduct, Cendant, JH, and TSA nevertheless facilitated and continued to facilitate the commission of those unlawful acts as alleged above. Cendant, JH, and TSA intended to encourage and facilitate the commission of the unlawful acts, and did encourage, facilitate, aid, promote and/or instigate the commission of unlawful acts, and thereby aided and abetted the other Defendants unlawful conduct. For these reasons, Cendant, JH, and TSA is liable for the violations committed by SBBT.

SIXTH CAUSE OF ACTION
(Declaratory Relief, Brought by All Plaintiffs
Against All Defendants)

78. Plaintiffs reallege and incorporate herein as though set forth in full the allegations of paragraphs 1 through 77 above.

79. An actual controversy has arisen and now exists relating to the rights and duties of the parties herein. Plaintiffs contend that:

(a) Defendants' practice of cross-lender debt collection is unlawful, unfair and fraudulent;

(b) Defendants' practice of inducing consumers into entering into RAL Application/Agreements containing the SBBT Cross-Lender Debt Collection Provision is misleading, deceptive, fraudulent, unfair and unlawful; and

(c) the RAL Agreement/Application and/or SBBT Cross-Lender Debt Collection Provision are unconscionable, unlawful, unfair, unenforceable, oppressive, and are void and of no force or effect in all respects.

80. Plaintiffs contend that Defendants' practices have violated the Consumer Legal Remedies Act, the Robbins-Rosenthal Act, the Unfair Competition Law, Business and Professions Code §§17200, *et seq.* The Subclass also contends that Defendants have converted their property.

81. Defendants dispute Plaintiffs' contentions. They contend that its practice of cross-lender debt collection is lawful and that the SBBT Cross-Lender Debt Collection Provision is valid, creates binding contracts, and is enforceable in all respects.

82. Plaintiffs desire a declaration as to the lawfulness of Defendants' practice of cross-lender debt collection, the validity and enforceability of the SBBT Cross-Lender Debt Collection Provision, and whether Defendants' methods of inducing consumers to enter into the Provision is unlawful, unfair or fraudulent. A judicial declaration is necessary and appropriate at this time so that Plaintiffs may ascertain their rights and duties, and those of other affected persons.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray as follows:

1. That this Court certify this case as a class action and appoint Plaintiff Hood as a class representative;

2. That this Court find and declare Defendants' acts and practices as described herein to be unlawful, unfair and fraudulent;

3. That Defendants be permanently enjoined from engaging in the unlawful, unfair and fraudulent acts and practices alleged herein;

4. That Defendants be ordered to disgorge all unjust enrichment obtained from the unlawful, unfair and fraudulent acts and practices alleged herein;

5. That Plaintiffs and the Plaintiff Class and subclasses be awarded compensatory damages according to proof at trial;

6. That the Plaintiff Class and subclasses be awarded statutory damages under Civil Code § 1780(b) according to proof at trial;

7. That Plaintiffs and the Plaintiff Class and subclasses be awarded punitive damages according to proof at trial;

8. That Defendants be ordered to make restitution to all affected members of the general public;

9. That Plaintiffs be awarded attorneys' fees and expenses pursuant to California Civil Code § 1790(d), California Civil Code § 1788.30(c), and California Code of Civil Procedure § 1021.5;

10. For costs of suit herein incurred; and

11. For such other and further relief as the court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury as to all causes of action so triable.

DATED:
September 8, 2004

Respectfully submitted,

THE STURDEVANT LAW FIRM
A Professional Corporation
James C. Sturdevant
Monique Olivier

THE NATIONAL CONSUMER
LAW CENTER
Stuart Rossman
Chi Chi Wu

By: /s/ James C. Sturdevant
James C. Sturdevant
Attorneys for Plaintiffs

EXHIBIT 1

[Original document was in a two-column format in 8 point type; typography modified for U.S. Supreme Court filing requirements.]

SANTA BARBARA BANK & TRUST
REFUND ANTICIPATION LOAN APPLICATION AND AGREEMENT

A Program Available Through
Jackson Hewitt Tax Service®

SANTA BARBARA BANK & TRUST ("SBBT") REFUND ANTICIPATION LOAN ("RAL") DISCLOSURE STATEMENT

A. You can file your tax return electronically without obtaining a RAL from SBBT. If you file your return electronically and do not designate an account with SBBT or another bank for direct deposit of your refund, you could receive a refund check directly from the IRS within 21-28 days.

B. You can apply for an accelerated check refund ("ACR") or an assisted direct deposit ("ADD") from SBBT without obtaining a RAL. If you file your tax return electronically and apply for direct deposit from SBBT or designate another bank for direct deposit, you could receive your refund within 9-16 days from the date the IRS accepts your return. From the refund, you must pay an ACR Handling Fee of $25 or an ADD Handling Fee of $15 to SBBT and an ACR/ADD Application Fee (normally about $30) to your Tax Preparer. A state ACR may also be available without obtaining a RAL for an additional $10 Handling Fee to SBBT.

C. You can apply for a RAL from SBBT. If you apply to SBBT and are approved for a RAL, the loan proceeds will normally be made available to you in as little as one day of approval of your application. You must pay the ACR Handling Fee of $25 and ACR Application Fee (normally

about $30) as indicated in item B above, plus a Finance Charge to SBBT equal to 3.25% of the RAL, but not less than $10 or more than $70. The Finance Charge will be increased by $10 if the tax refund includes Earned Income Tax Credit (EIC).

D. The following are examples of the Annual Percentage Rates ("APR") for various RALs (w/EIC) assumed to be repaid in 10 days:

Amount of RAL	Finance Charge*	Annual Percentage Rate ("APR")
$ 200.00	$ 20.00	405.56 %
$ 500.00	$ 26.00	200.21 %
$ 750.00	$ 34.00	173.32 %
$ 1000.00	$ 43.00	164.00 %
$ 1500.00	$ 59.00	149.44 %
$ 2000.00	$ 75.00	142.21 %
$ 3000.00	$ 80.00	100.00 %
$ 4000.00	$ 80.00	74.49 %
$ 5000.00	$ 80.00	59.35 %

* This chart does not include other fees or amounts you have authorized SBBT to deduct from the amount of the RAL, including the Tax Preparer's Fee, the ACR Handling Fee of $25, the ACR Application Fee, normally about $30, and other amounts authorized by you to purchase additional products offered by your Tax Preparer. You will receive a Truth-in-Lending Disclosure on a separate RAL Information Form or on the stub of your RAL disbursement check, which will list the actual loan amount, Finance Charge, the Annual Percentage Rate and other fees and amounts related to your RAL transaction.

1. REFUND ANTICIPATION LOAN ("RAL") APPLICATION AND AGREEMENT: As used in this RAL Application and Agreement ("RAL Application") the term

"you" and "your" will refer to the person signing below as the "Taxpayer" (or, if this is a joint return, both "Taxpayers"). You hereby apply to SBBT for a RAL in the amount of your expected 2001 Federal income tax refund (the maximum loan amount is $5000). If SBBT denies your application for a RAL for the full amount of the refund, you authorize SBBT to provide a RAL to you in a lesser amount at SBBT's discretion. If you are approved for a RAL, you agree that the provisions of this RAL Application will govern your RAL, including your obligation to repay all amounts loaned to you. You agree that if you are approved for the RAL, you must pay an ACR Handling Fee of $25, an ACR Application Fee (normally about $30) and a Finance Charge to SBBT equal to 3.25% of the RAL, but not less than $10 or more than $70. The Finance Charge will be increased by $10 if the tax refund includes Earned Income Tax Credit (EIC).

Release of Personal Information: You authorize Jackson Hewitt Inc. ("JHI") and your Jackson Hewitt Tax Service ® Tax Preparer/Electronic Filer ("Tax Preparer") to disclose to SBBT and SBBT's agents and assigns any and all tax information described in Treasury Regulations Section 301.7216-1(b)(3) with respect to your Federal income tax return for tax year 2001 (the "Return"), and any information contained in the Return and this RAL Application ("Shared Information"). You further authorize SBBT and other RAL Lenders to disclose to each other information about their respective experience concerning the funding of your present or prior RALs or tax refund amounts and you authorize the IRS to disclose to SBBT any information related to the funding of your Return. SBBT may use this information for the purpose of:

(a) processing this RAL Application or deciding whether to approve or to deny this RAL Application; (b) collecting any outstanding or delinquent RALs or Tax Preparer's fees; or, (c) detecting and preventing fraud associated with the filing or processing of this RAL Application or your tax return. You hereby authorize SBBT to disclose this information or the results of its evaluation of your RAL Application or your funding history with the IRS (or state taxing authority, if applicable), JHI and your Tax Preparer, other RAL lenders and the Fraud Service Bureau for the purposes stated above or as otherwise permitted by law. You also authorize SBBT, JHI or your Tax Preparer to use the Shared Information or the results of SBBT's evaluation of your RAL Application or funding history for the purpose of contacting you about additional products offered by either SBBT, JHI or your Tax Preparer. The use of the Shared Information by all of the foregoing parties shall be limited by contract or law to the purposes identified above. Neither SBBT, JHI nor your Tax Preparer may use or disclose information regarding your Return or the information in this RAL Application for any purpose not otherwise permitted under Treasury Regulation Section 301.7216-2 or by this RAL Application. You also authorize SBBT to make inquiries to credit reporting agencies and others that SBBT deems necessary to make a credit decision, and to make reports to credit reporting agencies and other RAL lenders about its credit experience with you.

Disbursement Method: If SBBT approves this RAL Application, SBBT will deduct from your total loan amount the fees, charges and amounts authorized in Section 2 and disburse the balance of the RAL (RAL

proceeds) to you according to the disbursement method you choose below:

X i) you authorize SBBT to disburse your RAL proceeds to you by way of an ACR check issued through your Tax Preparer.

__ ii) you authorize SBBT to disburse your RAL proceeds to you by transferring your RAL proceeds to Western Union Financial Services, Inc. and its affiliates or authorized designees (collectively "WU") to allow you to participate in, and obtain your RAL proceeds via the Jackson Hewitt CashCard Program (the "Card Program") offered by JHI and WU through your Tax Preparer. You agree that SBBT, JHI and your Tax Preparer may share this RAL Application and other information with WU to the extent necessary to facilitate and document the completed transfer of your RAL proceeds to WU.

SBBT, JHI and your Tax Preparer will not be responsible for RAL proceeds transferred pursuant to this Agreement once the transfer of the RAL proceeds to WU has been completed. In the event SBBT is unable to complete a transfer of your RAL proceeds to WU, you authorize SBBT to pay your RAL proceeds to you by way of an ACR check issued through your Tax Preparer or mailed to you by SBBT.

Please Note: You will be required to pay additional fees and charges under the terms of the Card Program in order to access your RAL proceeds. Please review the Jackson Hewitt CashCard Agreement and Disclosure Statement to determine the maximum fees and charges that may apply.

Deposit Account Authorization: You authorize SBBT to establish a deposit account (the "Account") in your name for the purpose of receiving a direct deposit of your Federal tax refund from the Internal Revenue Service ("IRS"). When your refund is received from the IRS and is deposited in the Account, you authorize SBBT to apply your refund in the following order of descending priority: (a) to the Total Fees in Section 2.f below; (b) to SBBT's Finance Charge; (c) to any other fees or charges set forth in Section 2 below; (d) to the repayment of the remaining principal balance of the RAL; and (e) to any outstanding amounts due pursuant to Section 6. Any sum in excess of $1.00 will be disbursed to you by ACR check issued through your Tax Preparer or by a transfer to WU dpending on which option you selected in the previous paragraph. You acknowledge that the IRS does not guarantee when a tax refund will be issued or the amount of the refund. If, for any reason, any part of your anticipated refund is disallowed or offset by the IRS, or if you should receive a refund check in the mail from the IRS, you agree to advise SBBT and promptly repay the RAL directly to Santa Barbara Bank & Trust, P.O. Box 1270, Solana Beach, CA 92075, Attention: RAL Department.

If you are also filing your state tax return electronically and have elected to have your state refund disbursed by SBBT, you hereby authorize your 2001 state refund amount to be directly deposited from the appropriate state agency to the Account and disbursed according to the instructions provided in the Disbursement Method paragraph above.

Denied RAL. If this RAL Application is not approved, you will receive an ACR check when your refund is received from the IRS. If this happens, you agree that SBBT may deduct from the Account the Total Fees shown in Section 2.f below and any amounts due pursuant to Section 6 below

(state ACR Handling Fee can only be deducted from the Account after the state refund is received). You also agree that the Total Fees in Section 2.f below (except for the ACR Handling Fee) and any amounts due pursuant to Section 6 below can be deducted from the Account if a state tax refund is received before the Federal tax refund is received. Any balance remaining in the Account will be disbursed to you by ACR check regardless of the disbursement method selected above. If your RAL Application is not approved, you will not be charged the Finance Charge.

2. AUTHORIZATION TO PAY FEES. In addition to any outstanding amounts due pursuant to Section 6, you agree to pay the following fees and charges. Among other things, you agree to pay SBBT a Finance Charge for the RAL equal to 3.25% of the amount of the RAL, but not less than $10 or more than $70. The Finance Charge will be increased by $10 if the tax refund includes EIC. **The actual finance charge and loan amount will be disclosed in the Truth-in-Lending section of your RAL Information Form or RAL disbursement check.** You agree to pay the Total Fees listed below, whether or not your RAL Application is approved.

a. Tax Preparation and Filing Fees (Payable to your Tax Preparer)	$ 155		
b. ACR Application Fee (Payable to your Tax Preparer)	$ 30		
c. ACR Handling Fee (Payable to SBBT)	$ 25.00		
d. State ACR Handling Fee (Payable to SBBT)	$		
e. Other	$		
f. Total Fees		$	210
g. Estimated Finance Charge (Payable to SBBT)	$ 80		
h. Total of Fees and Estimated Finance Charge		$	290

You acknowledge that SBBT may share a portion of the ACR Handling Fees and Finance Charge with JHI.

3. TAXPAYER INFORMATION (Complete for both taxpayers only if filing a joint return and application.)

Taxpayer's Name
HOOD, CANIEVA
Social Security No. [redacted]
Date of Birth [redacted] (Must be 18 or older)
Telephone No. [redacted]

Spouse's Name

Social Security No.
Date of Birth
Telephone No. [redacted]

Closest relative not living with you:
Name ESSIE BURNS
Relationship AUNT Telephone No. [redacted]

4. IDENTIFICATION OF TAXPAYER (One form of picture I.D. required for both primary and spouse if joint return filed)

	Primary	State	Number	Expires
☒	Driver's License w/Picture	CA	[redacted]	05/2005
☐	State ID			
☐	Current Military ID			
☐	U.S. Passport			
☐	Resident Alien ID			
☐	Union Membership ID			
	Union/Local Name			
☐	American Indian Tribal ID			
☐	School Picture ID			
	School Name			

Spouse	State	Number	Expires
☐ Driver's License w/Picture			
☐ State ID			
☐ Current Military ID			
☐ U.S. Passport			
☐ Resident Alien ID			
☐ Union Membership ID			
Union/Local Name			
☐ American Indian Tribal ID			
☐ School Picture ID			
School Name			

5. NAME/SOCIAL SECURITY NUMBER VALIDATION (Obtain name and check digits from IRS label wherever possible. Tax Preparer must initial only one.) **MUST BE COMPLETED FOR PRIMARY TAXPAYER.**

____	2001 IRS Mailing Label/Check Digits from Label	
X	Current Social Security Card/SSN	[redacted]
____	Current Military ID	
____	2000 tax return (must include a standard W-2 or 1099)	

6. a. COLLECTION OF DELINQUENT RAL. You authorize JHI and SBBT to exchange information about your current and prior RALs with other RAL lenders including Bank One, N.A., Beneficial National Bank/ Household Bank, First Security Bank, River City Bank, County Bank of Rehoboth Beach, DE and Republic Bank & Trust Company/Refunds Now. If you have delinquent RALs from prior years with SBBT or any one or more of these lenders that have not been discharged in bankruptcy, you will not be eligible for a RAL but will instead receive an ACR. Upon receipt of your tax refund, you

authorize SBBT to deduct from the Account, after deducting the applicable fees as set forth in Section 2 above, the total amount due on the prior year RALs and forward such amount to the appropriate RAL lender(s) prior to disbursing the balance of the Account to you.

b. COLLECTION OF OUTSTANDING TAX PREPARER FEES: If you still owe fees to a Tax Preparer for preparing your 2000 Federal (and state if applicable) tax return, you authorize SBBT to deduct the amount of the outstanding fees from your RAL proceeds after the applicable fees in Section 2 have been deducted and prior to disbursing the balance of your RAL proceeds to you or, in the event your RAL is denied and converted to an ACR, you authorize the outstanding Tax Preparer fees to be deducted from the Account after the applicable fees as set forth in Section 2 and amounts in Section 6.a have been deducted from the Account and prior to disbursing the balance of the Account to you.

c. COLLECTION OF OUTSTANDING HOLIDAY LOAN: If you (either Taxpayer or Spouse if this is a joint return) have an outstanding loan ("Holiday Loan") provided by SBBT under the Holiday Express Loan Program and the Holiday Loan has not been discharged in bankruptcy, you authorize SBBT to deduct from the Account, after deducting the applicable fees and charges disclosed in Section 2, the total amount due on the Holiday Loan and apply it towards your outstanding Holiday Loan balance with SBBT prior to disbursing the balance of the Account to you.

You understand that SBBT may be acting as a debt collector hereunder in attempting to collect a debt pursuant to Section 6 and may use your authorization pursuant

to this RAL Application and any information obtained in connection with this RAL Application to collect a delinquent RAL, Holiday Loan or Tax Preparer fees as noted above.

7. SECURITY INTEREST AND ASSIGNMENT. You hereby assign to SBBT your 2001 Federal income tax refund, your Account, and all funds deposited therein, to the extent necessary to reimburse SBBT for your RAL and/or facilitate collection by SBBT of any other amounts pursuant to this RAL Application. You also grant SBBT a security interest in the same. You agree that SBBT may assign, sell or transfer its ownership of the RAL and all or part of its rights arising under this RAL Application to a third party or affiliate of SBBT and that SBBT may make any transfers from the Account necessary to accomplish said assignment, sale or transfer. You may not revoke this assignment or security interest.

8. MISCELLANEOUS. (a) The provisions in this RAL Application survive the issuance of the ACR check, the approval of this RAL Application and the execution and delivery of the RAL proceeds. (b) The enforcement and interpretation of this RAL Application and the transactions contemplated herein (including, without limitation, the applicable interest rate) shall be governed by the laws of the State of California applicable to contracts executed and to be performed entirely in the State of CA by residents of the State of California, without regard to the conflicts of laws, and, to the extent applicable, by the laws of the United States of America. (c) You agree to pay any costs of collection, including reasonable attorneys' fees, if the RAL is not paid when due.

9. CERTIFICATION. You hereby certify that: (a) You are not delinquent in the payment of taxes, either individual or business, to the IRS or any state agency; (b) you are not delinquent in the payment of any child support or alimony; (c) you are not delinquent in the payment of any student loans, Veteran Administration loans or other Federally sponsored loans; (d) you have not previously filed a 2001 Federal income tax return; (e) you have not paid any estimated tax and/or did not have any portion of your 2000 refund applied to your 2001 taxes; (f) you understand that you are applying for a loan in the amount of your expected Federal income tax refund, not to exceed $5,000 including fees; (g) you are of legal age to enter into contracts in the State where you reside; (h) you do not have a power of attorney presently in effect or on file with the IRS to direct your Federal tax refund to any third party; (i) you have read all documents relating to this RAL Application, including disclosures statements; and (j) you are not presently making regular payments or are delinquent in making such payments to the IRS for unpaid taxes in prior years.

10. ACKNOWLEDGEMENT REGARDING TAX PREPARER AND JHI. You agree that neither your Tax Preparer nor JHI is acting as your agent or is under any fiduciary duty to you regarding this RAL Application and the RAL. Among other things, you agree and consent to the receipt by your Tax Preparer and/or JHI of fees as set forth in this RAL Application.

SIGNATURES: BY SIGNING BELOW, YOU ACKNOWLEDGE THAT EVERYTHING YOU HAVE STATED IN THIS RAL APPLICATION AND AGREEMENT IS TRUE AND CORRECT. YOU ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND

AND AGREE TO EACH OF THE TERMS AND CONDITIONS HEREIN. YOU PROMISE TO PAY UPON DEMAND OR FROM THE ACCOUNT THE "TOTAL REFUND ANTICIPATION LOAN" AMOUNT DISCLOSED ON YOUR DISBURSEMENT CHECK OR RAL INFORMATION FORM. YOU ACKNOWLEDGE RECEIVING A COMPLETED COPY OF THIS RAL APPLICATION AND, AMONG OTHER THINGS, CONSENT TO THE COLLECTION AUTHORIZATIONS IN SECTION 6 ABOVE AND THE CERTIFICATION IN SECTION 9 ABOVE. YOU ALSO ACKNOWLEDGE RECEIVING THE FOLLOWING NOTICE ENTITLED "IMPORTANT INFORMATION REGARDING YOUR REFUND ANTICIPATION LOAN (RAL)" AND, IF YOU ELECTED TO HAVE YOUR RAL PROCEEDS DISBURSED THROUGH THE CARD PROGRAM, YOU ACKNOWLEDGE RECEIVING THE "RAL" INFORMATION FORM" SEPARATELY

You certify that you have received your ACR check. (If check is mailed to taxpayer, indicate "mailed" and date)

Signature of Taxpayer	Date	Check No.
Signature of Taxpayer	Date	Check No.
Signature of Taxpayer	Date	Check No.
Witness/Date 1	Witness/Date 2	Witness/Date 3

Signature of Taxpayer	Date
Signature of Joint Taxpayer (if joint application)	Date
Witness (Tax Preparer)	Date

PLEASE READ THE IMPORTANT DISCLOSURES ON THE FOLLOWING PAGE

IMPORTANT INFORMATION REGARDING YOUR REFUND ANTICIPATION LOAN ("RAL")

If you are applying for a RAL from SBBT, this loan program is made possible by special arrangements among Santa Barbara Bank & Trust, of Solana Beach, California ("SBBT"), Jackson Hewitt Inc. ("JHI") and your Jackson Hewitt Tax Service (R) Tax Preparer ("Tax Preparer"). SBBT is able to provide this loan program to you because you have elected to participate in the IRS Electronic Filing and Direct Deposit options for your Federal Income Tax Return. The amount of the RAL that you can apply for is the anticipated amount of your Federal Income Tax Refund not to exceed $5000, including all authorized fees. From this loan amount will be deducted the tax preparation fee imposed by your Tax Preparer, the Accelerated Check Refund ("ACR") Application Fee (normally about $30) charged by your Tax Preparer, SBBT's ACR Handling Fee of $25, SBBT's State ACR Handling Fee of $10 (if state tax return is electronically filed and this option is also chosen), other amounts authorized by you to purchase additional products offered by JHI or your Tax Preparer and a SBBT Finance Charge equal to 3.25% of the RAL, but not less than $10 nor more than $70. The Finance Charge will be increased $10 if the tax refund includes EIC. If your return is prepared by a Tax Preparer and you apply for an ACR or RAL from SBBT and are approved, there will be no fee for filing your return electronically.

PLEASE NOTE: YOUR RAL CAN BE DECLINED BY SBBT:

After you have signed your RAL Application, your Tax Preparer will electronically transmit: (1) your tax return

to the IRS; and (2) the RAL Application to SBBT. Upon IRS acceptance of your tax return for electronic filing and direct deposit, and SBBT's approval of your loan request based on its standards for approval of RALs, your RAL proceeds, in an amount equal to your anticipated refund amount minus the fees and amounts authorized in the RAL Application, will be disbursed to you via the disbursement method chosen by you in Section 1 of the RAL Application under the paragraph titled "Disbursement Method." If your RAL Application is approved by SBBT and you chose to receive your RAL proceeds by ACR check, you can expect to receive your ACR check from SBBT in as little as one day after SBBT receives IRS acknowledgement that your tax return has been accepted (IRS acknowledgement usually occurs within 48 hours of filing your return). If your RAL Application is approved by SBBT and you have chosen to have your RAL proceeds transferred to Western Union Financial Services, Inc. and its affiliates or authorized designees, (collectively "WU") your RAL proceeds should be available via your Cash Card in as little as one day from the time SBBT receives the IRS acknowledgement. The IRS will normally issue your refund within 9-16 days after the IRS acknowledgement of your return, so you can expect your RAL to be repaid within this period.

Upon approval of your RAL Application, SBBT will also open a deposit account in your name. This account is established to receive the direct deposit of your Federal income tax refund and state refund (if applicable). By endorsing the ACR check, you will be agreeing to allow SBBT to withdraw the amount deposited by the IRS into this deposit account and apply that amount to your RAL balance. The excess, if more than $1.00, will be promptly refunded to you via the disbursement method chosen by you in Section 1 of the RAL

Application under the paragraph titled "Disbursement Method." If SBBT does not receive payment from the IRS within 60 days, or is informed that it will not receive full payment, it will require you to repay the loan in full at that time. If, after you apply for the RAL you decide that you do not want it, you must promptly return the ACR check, unendorsed, to your Tax Preparer. A new ACR check will then be delivered or mailed to you for the refund due you when it is received from the IRS, less the Total Fees shown in Section 2.f of the RAL Application and any amounts due under Section 6. If the RAL is cancelled, a new ACR check will then be delivered or mailed to you for the refund due you when it is received from the IRS, less the applicable fees shown in Section 2 of the RAL Application and any amounts due under Section 6. If you have chosen to have your RAL proceeds transferred to WU, you cannot cancel your RAL.

New York Residents: A credit report may be requested in connection with your RAL Application. At your request SBBT will tell you whether or not a credit report was obtained and, if so, the name and address of the credit reporting agency that furnished the report.

Ohio Residents: Ohio laws against discrimination require that all creditors make credit equally available to all credit-worthy customers and that credit-reporting agencies maintain separate credit histories on each individual upon request. The Ohio Civil Rights Commission administers compliance with this law.

Wisconsin Residents: Wisconsin law provides that no agreement, court order, or individual statement applying to marital property will affect a creditor's interest unless, prior to the time credit is granted, the creditor is furnished

with a copy of the agreement, court order, or statement, or has actual knowledge of the adverse provision.

SHOULD ANY OF THE FOLLOWING SITUATIONS OCCUR, PLEASE CONTACT YOUR TAX PREPARER AND CALL SBBT AT (888) 353-7228

- If you receive a refund check directly from the IRS: This should not happen since you have chosen direct deposit of your refund to your deposit account at SBBT. However, if you do receive a refund check from the IRS, you must mark the reverse side of the check "Pay to Santa Barbara Bank & Trust" and then endorse it (exactly as your name appears on the front) and forward it promptly to: Santa Barbara Bank & Trust, P.O. Box 1270, Solana Beach, Ca 92075 Attn: RAL Department.

- If you receive any correspondence from the IRS regarding the partial or non-payment of your Return. This could occur if your tax liability is adjusted by the IRS. If this happens, you will receive a notice from the IRS. Of course, you will still be responsible for paying SBBT directly any additional amount needed to satisfy your RAL. If this occurs, please contact your Tax Preparer and SBBT immediately. The IRS makes no guarantee with respect to the date the tax refund will be issued or of the amount of your refund.

FEDERAL ELECTRONIC FUND TRANSFER DISCLOSURES

The Federal Electronic Fund Transfer Act provides you with certain rights and obligations regarding the preauthorized Federal and state income tax refund that will be electronically deposited into your deposit account established at SBBT for that purpose.

- **Contact SBBT in the event of Unauthorized Transfer** – If you believe that there is an error or if you have a question about your deposit account, write to Santa Barbara Bank & Trust, P.O. Box 1270, Solana Beach, California 92075 or telephone (888) 353-7228 and provide SBBT with your name, a description or explanation of the error and the dollar amount of the suspected error. SBBT will advice you of the results of its investigation within 10 business days. You may ask for copies of the documents that we used in our investigation. You may also reach us at the above address and phone number to inquire about the receipt of your refund from the IRS, which is usually made within 9 to 16 days after the IRS accepts your electronic return.

- **Business Days** – for purposes of these disclosures, SBBT's business days are Mondays through Fridays, except holidays.

- **Limitations on Electronic and Other Transfers** – Depending on the authorizations you made pursuant to the RAL Application, the only electronic transfers that are allowed into or out of your deposit account are a) the electronic deposit of your Federal income tax return and, if applicable, the electronic deposit of your state income tax return b) transfers from the deposit account to pay fees, charges or collection amounts authorized by you in the RAL Application, and c) transfers from the deposit account to WU (if applicable). You are not allowed to make any other deposits or withdrawals from the deposit account, including electronic deposits and withdrawals.

- **SBBT's Liability** – If SBBT does not complete a transfer to your deposit account on time or in the correct amount according to your RAL Application and Agreement, SBBT will be liable for your losses or damages.

However, there are some exceptions. SBBT will not be liable, for example

If, through no fault of SBBT, the IRS or state tax authority determines that the transfer(s) cannot be made.

If the system was not working properly and you were aware of the breakdown.

If circumstances beyond SBBT's control (such as fire or flood) prevented the transfer, despite reasonable precautions SBBT has taken.

There may be other exceptions stated in your RAL Application.

- **Confidentiality** – SBBT will disclose information to third parties about your deposit account and the transfers that are made:

Where it is necessary for completing transfers.

In order to verify the existence and condition of your deposit account to a third party such as a credit bureau or another RAL lender.

In order to comply with government agency or court orders.

If you otherwise give us permission.

TRUTH IN SAVINGS DISCLOSURE The following information is provided in accordance with Federal Truth-in-Savings Act:

- **Rate Information** – No interest will be paid on your deposit account, which is an annual percentage yield of 0%.
- **Minimum Balance Requirements** – In order to open this deposit account, you must

have a RAL approved by SBBT. The amount of the RAL will become the deposit amount necessary to open the account.

- **Fees** – You will be charged $25 ACR Handling Fee to open the deposit account as shown above in Section 2.
- **Transaction Limitations** – You will not be allowed to make withdrawals or deposits into the account (except for the preauthorized deposit of your IRS tax return and, if applicable, your state income tax return). Your RAL will be repaid from the funds in the deposit account in accordance with the terms of the RAL Application.
- **Maturity** – Your account will mature and be closed as soon as your RAL is repaid, which is usually 10 business days after the approval of your RAL.

EQUAL CREDIT OPPORTUNITY: The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with the law concerning this bank is the Federal Reserve Bank of San Francisco, 101 Market, San Francisco, CA 94105.

EXHIBIT 2

[Typography modified for
U.S. Supreme Court filing requirements.]

SANTA BARBARA BANK & TRUST

02/03/02

CANIEVA D HOOD
[STREET ADDRESS]
ENGLEWOOD OH 45322

Household Bank f.s.b.
Household Tax Masters
200 Somerset Corporate Blvd.
Bridgewater, NJ 08807 (800) 524-0628

Outstanding Loan Amount: 2,308.50 Loan Date: 01/28/95

Dear Applicant;

Recently you have applied for either a Refund Anticipation Loan ("RAL") or Refund Transfer ("RT") with Santa Barbara Bank & Trust ("SBB&T"). We are unable to grant your request because we have been informed of an outstanding debt with another RAL lending institution for a prior tax year. The amount of the debt and the name of the lending institution you owe are listed above.

Pursuant to Section 809 of the Consumer Credit Protection Act, we are obligated to inform you that, if your debt has not been paid five days after the receipt of this correspondence, you:

- Have 30 days from receipt of this notice to dispute the debt before it assumed to be valid.
- Upon providing written notice of the dispute to Santa Barbara Bank & Trust, may receive verification of the debt from the lender

listed above. You may also contact the lender directly for verification.

If the Internal Revenue Service still sends your refund amount to SBB&T, we will deduct, on your behalf, the amount of your RAL obligation after fees and charges have been deducted and forward those funds to the appropriate RAL lender. If additional funds are available after the RAL debt has been satisfied, SBB&T will disburse them immediately to you.

If you have any additional questions regarding the denial of your RAL or RT request with Santa Barbara Bank & Trust, you may contact our RAL department using information shown below:

Santa Barbara Bank & Trust
Refund Anticipation Loan Department
P.O. Box 1270
Solana Beach, CA 92075-7270
1-888-828-7228

Our credit decision was based in whole or in part on information obtained from an outside source other than a consumer credit reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request (to the above address) no later than 60 days after you receive this notice, for disclosure of the nature of this information.

NOTICE

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or

part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right and/or the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this bank is the Federal Reserve Bank, 101 Market Street, San Francisco, CA 94105.

EXHIBIT 3

[Typography modified for
U.S. Supreme Court filing requirements.]

ELECTRONIC TAX FINANCIAL SERVICES

Ms. Rachel K. Robinson
Equal Justice Foundation
36 W. Gay St. – Suite 300
Columbus, OH 43215

June 20, 2002

Dear Ms. Robinson:

I am writing in response to your letter of June 12, 2002 requesting information for your client, Canieva Hood.

After Ms. Hood electronically filed her 2001 federal income tax return through Jackson Hewitt Tax Service, she was denied a Refund Anticipation Loan (RAL) by Santa Barbara Bank & Trust (SBB&T) because we had a record showing Ms. Hood had an outstanding RAL with Household Bank.

The record of Ms. Hood's outstanding RAL was provided to SBBT by Household Bank.

If you have further questions or concerns, please feel free to contact me at (888) 353-7228, ext. 6462, Monday through Friday from 7 a.m.-4 p.m., Pacific Daylight Time.

Cordially,

/s/ Kevin Scattereggia
Kevin Scattereggia
Asst. Supervisor
Santa Barbara Bank & Trust
RAL Department

SANTA BARBARA BANK & TRUST
P.O. Box 1270 • Solana Beach, CA 92075 •
1-888-828-SBBT(7228) • Fax 858-458-3286 •
www.sbbtral.com

EXHIBIT 4

[Typography modified for
U.S. Supreme Court filing requirements.]

HOUSEHOLD [LOGO]

Refund Lending
Churchman's Corporate Center
90 Christiana Road
New Castle, DE 19720

July 24, 2002

Equal Justice Foundation
36 W. Gray St., Suite 300
Columbus, OH 43215

Att: Rachel K. Robinson
Staff Attorney

Re: Canieva D. Hood

Dear Ms. Robinson;

This is in response to your letter of June 12, 2002 to Santa Barbara Bank & Trust regarding our above customer. Santa Barbara Bank and Household Bank, f.s.b. have a collection agreement whereby we collect on each other's accounts.

Household Bank (formerly Beneficial National Bank) made a Refund Anticipation Loan to Canieva Hood on January 28, 1995 in the amount of $2,840. This loan was to be paid with the deposit of Ms. Hood's tax refund of a like amount at our bank. However, the IRS deposited only $806 leaving an unpaid balance of $2,034. I have attached an Itemized Statement showing all transactions made on the account.

If you need any additional information regarding Ms. Hood's account, I can be reached at 302-327-2770.

Sincerely,

/s/ Gus Morris
Gus Morris, Director
Loss Prevention

Enclosures

CC: Santa Barbara Bank & Trust
Refund Anticipation Loan Department
P.O. Box 1270
Solana Beach, CA 92075-7270

(3)

No. 06-1330

FILED
MAY 0 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

SANTA BARBARA BANK & TRUST, et al.,

Petitioners,

v.

CANIEVA HOOD AND CONGRESS OF CALIFORNIA SENIORS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

OPPOSITION TO PETITION FOR CERTIORARI

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Canieva Hood and Congress of California Seniors

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OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The Petition addresses a non-final state court decision that interprets the text of a regulation of the Office of the Comptroller of Currency ("OCC"). The Petition does not cite to a single decision of any court in the country that disagrees with that interpretation. Indeed, Petitioner does not cite (and Respondents do not know of) any application of this regulation to a situation that approaches the situation posed by the factual allegations of this case.

To fill the void created by the lack of any conflict in this area, Petitioner characterizes this case as posing central issues at the heart of national banking law. Petitioner relies heavily upon this Court's recent decision in *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007), which Petitioner argues demonstrates that national law "regulates [the national banks'] core banking activities." [Petitioner's Supplemental Brief at 5.] Petitioner also argues that *Watters* demonstrates that national banks' banking activities are "controlled" by the regulations of the OCC. [Petitioner's Supplemental Brief at 3.] The problems with this approach, which are downplayed to the point of invisibility in the Petition, are that (a) the conduct involved here involves third party debt collection, not lending activity, and thus plainly is not a "core banking activity" of the sort addressed in *Watters*; and (b) the decision of the court below rests upon the express language of an OCC regulation providing that state law governs debt collection activities, and (unlike *Watters*) this case does not involve a frontal attack upon the validity of the OCC's regulations.

This Court should deny the Petition for three reasons. First, the Court does not have jurisdiction over this case.

The ruling below denying a motion to dismiss is not a final judgment under 28 U.S.C. § 1257(a), and this case does not fall within any of the four exceptions to the final judgment rule recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Second, there is no conflict between the decision below and any other court on the issue decided by the lower court. This case is not about banking. It does not involve lending, deposit-taking, or any traditional banking activity. What it does involve is a national bank engaged in third party debt collection on behalf of other banks. This case concerns Santa Barbara Bank & Trust's ("SBBT") agreements with a number of other lenders to collect each other's alleged debts. Under these agreements, whenever one of SBBT's potential customers is discovered to allegedly owe money to another lender relating to a Refund Anticipation Loan ("RAL") that lender previously made to the customer, SBBT denies the loan application (regardless of whether the customer otherwise would qualify for such a loan), seizes monies from the customer's tax refund, and sends those monies to the other lender. In other words, with respect to the business practices involved in this lawsuit, SBBT is not engaged in any form of banking, but in collecting alleged debts for others without notice or judicial process.

In this case, the California Court of Appeal was asked whether federal law (in the form of the regulations of the OCC) preempts California laws of general application governing abusive debt collection as those laws would apply to a national bank engaged in the non-banking activity of third party debt collection. As the Court of Appeal noted, the OCC's regulations contain a "savings clause" which explicitly provides that those regulations do

not preempt state laws relating to debt collection unless those laws more than incidentally affect the business of banking (e.g., deposit-taking or lending). [Pet. App. 14a.] The case law explains that state laws only more than incidentally affect the business of banking if they are aimed at that business in particular. Because the state laws at issue here – including California's laws which prohibit misleading communications relating to debt collection – apply to all businesses, the court below held that the state laws at issue here are clearly covered by the "savings clause." Petitioners point to no federal court of appeals, no state high court, and, indeed, no court of any sort, that has disagreed with the holding of the Court below with respect to this savings clause and state law claims of the sort raised here.

Third, there is no conflict between the decision below and the decisions of this Court. Petitioner attempts to invoke broad themes of deference to administrative agencies and presumptions, but none of those themes is essential to the narrow issue decided. The Court of Appeal's decision holding that California's general state laws dealing with debt collection are not preempted by the OCC's regulations, is a straightforward and correct reading and application of the OCC's savings clause. As such, the Court of Appeal's holding does not depend upon the answer to any of the "controversial" policy questions posed in the Petition about the nature of deference to administrative agencies and whether there is a presumption against preemption of state laws that regulate lending (as opposed to non-lending activities such as third party debt collection).

The decision below also rests on an independent ground that does not relate to either the issues of the

deference to agencies or the presumption against preemption. The Court of Appeal also held that the California laws governing abusive debt collection at issue here are not preempted because they are entirely consistent with, and merely offer another means of enforcing, federal laws that also govern debt collection. [Pet. App. 24a-25a.] In light of this confluence of federal and state law, the issues addressed in the Petition, are not essential to the holding below.

When this Court focuses upon the narrow issues actually decided by the Court of Appeal in this case, as opposed to the phantom global issues raised in the Petition, it will become clear that review is inappropriate and unnecessary.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

Jackson Hewitt, Inc. and its affiliates, Cendant Corporation and Tax Services of America (hereafter collectively "Jackson Hewitt") market and sell tax preparation services to consumers. Many low income taxpayers who receive the earned income tax credit seek assistance preparing their returns from tax preparation services. Jackson Hewitt partners with SBBT, which then offers RALs to these consumers. RALs are short-term, high-interest loans based upon the amount of a person's anticipated tax refund. In 2002, SBBT charged an annual percentage rate ranging from 59.35% to 405.58% for RALs. [Pet. App. 3a.]

RALs have often been advertised as "rapid refunds" or as a way to obtain a tax refund quickly. As a result, many taxpayers do not understand that RALs are, in fact, loans, secured by a pledge of an individual's tax refund, which the individual must pay back if the tax refund does not come through. To recover RALs that are unpaid, SBBT participates in agreements with other banks that make RALs to collect each other's outstanding RAL debts – arising from previously granted RAL loans – from RAL applicants (cross-collection agreements). To this end, SBBT and other RAL lenders insert a provision in RAL applications which purports to authorize this debt collection (cross-collection provision). Acting pursuant to their cross-collection agreements, the banks then collect each other's debts by denying RAL applications of persons with alleged prior RAL debt and seizing their tax refunds to pay the debt. Not surprisingly, customers often do not understand that they are applying for a high-interest loan, and that they also are signing a document permitting the lenders to deny their RAL applications and then seize their refunds to pay alleged third-party debts. [Pet. App. 81a-82a.]

Plaintiff and Respondent Hood is a taxpayer who has received the earned income tax credit for several years. On January 31, 2002, Hood went to a Jackson Hewitt Tax Service office for assistance in preparing and filing her income tax return. A Jackson Hewitt employee told Hood that she had two options for a quick refund: a "rapid refund" that she could receive the next day, or another refund that she could get in 48 hours. Hood selected the option for payment within 48 hours. The Jackson Hewitt employee did not explain that these options were loans or, that in seeking a quick refund, she would agree to allow

SBBT to seize her refund to repay any alleged outstanding RAL debts that she had with another lender.

The Jackson Hewitt employee asked Hood to sign and initial a set of documents, which included an application from SBBT for an RAL. Hood was also asked to sign a document authorizing the United States Treasury to electronically transmit her tax refund into a deposit account at SBBT. Hood was not given an opportunity to read the documents. The RAL application consists of four pages, each containing two columns of very fine, single-spaced text. The cross-collection provision is buried on the second and third pages of the application.

SBBT sent Hood a letter dated February 3, 2002, stating that her RAL was denied because Santa Barbara had "been informed of an outstanding [RAL] debt with [Household Bank]." Hood, who expected a refund of over $2,000, never received her refund or an RAL. Instead, SBBT seized her entire refund to pay an alleged debt Hood owed to Household Bank.

II. PROCEDURAL HISTORY.

A. Proceedings in the Superior Court.

In March 2003, plaintiffs filed their initial complaint seeking damages and other relief for the tort of conversion and for violations of state laws that prohibit abusive debt collection practices. The Court of Appeal provided a detailed, accurate summary of plaintiffs' claims in its decision. [Pet. App. 15a-17a.] The proposed plaintiff class is composed of all persons who at anytime from March 18, 1999 forward have had or will have their tax refunds

seized by SBBT as a result of the RAL procedures and collection methods challenged in the complaint.

The action was transferred to Santa Barbara Superior Court on March 15, 2004. Defendants demurred to the Third Amended Complaint on multiple grounds. The court overruled the demurrers (except as to one cause of action against Jackson Hewitt and another cause of action against Cendant and Tax Services of America).[1]

After the trial court overruled the demurrers, SBBT filed a cross-complaint seeking indemnity from other cross-collection agreement participants: Household Bank, F.S.B.; Beneficial National Bank; Household Tax Masters, Inc.; Bank One, N.A.; Republic First Bank; Republic Bank & Trust, River City Bank; First Bank of Delaware; and First Security Bank of Mackinaw, IL. SBBT and cross-defendants then filed a motion for judgment on the pleadings or, in the

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[1] In its order overruling the demurrer, the Superior Court made a number of important rulings:

- "Plaintiffs have sufficiently alleged facts demonstrating that a consumer would likely be deceived with respect to the characteristics of the services offered." [Decision and Order on Defendants' Demurrers and Motion to Strike ("Order") at 7:14-16.]
- "Plaintiff[s] sufficiently allege[ ] that Defendants failed to inform consumers that SBBT would engage in debt collection practices during the loan application and approval process in violation of Civil Code § 1788.13(I) (false representation of true nature of business or services being rendered by the debt collector) and failed to provide debt collection notices required by law." [Order at 8:4-8.]
- "Plaintiffs have sufficiently pled violation[s] of the UCL with respect to all Defendants based upon unfair and fraudulent business practices." [Order at 9:4-5.]

alternative, for summary adjudication based solely on the affirmative defense of preemption.

On May 18, 2005, the trial court granted the motion for judgment on the pleadings.[2] Plaintiffs filed a timely notice of appeal on July 11, 2005.

B. The Decision of the Court of Appeal.

The Court of Appeal reversed. The majority opinion held that the OCC's regulations do not preempt plaintiffs' state law claims. First, the Court examined the OCC's deposit-taking and lending regulations that expressly save from preemption state contract, tort, and debt collection laws that only incidentally affect the exercise of national banks' deposit-taking or non-real estate lending powers. [Pet. App. 20a, citing 12 C.F.R. §§ 7.4007(c)(1), (2), (4), 7.4008(e)(1), (2), (4).] The Court found that the state laws upon which plaintiffs' claims are based do not more than incidentally affect the banks' powers. [Pet. App. 20a-21a.]

Second, the Court of Appeal concluded that there is no preemption of plaintiffs' claims that seek to redress violations of state statutes that contain federal standards. [Pet. App. 25a.]

Third, the Court of Appeal correctly rejected the trial court's conclusion that the OCC's lending regulation encompassed the national banks' ability to require cross-collection provisions as a "risk mitigant" or "term of credit"

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[2] The Court denied as moot the motion for summary adjudication, specifically noting that it did not consider or rely upon any of the evidence that SBBT and cross-defendants submitted in support of the motion. [Pet. App. 36a.]

and therefore expressly preempted plaintiffs' state law claims. The Court found that the trial court's ruling gave an impermissibly expansive interpretation to the phrase "risk mitigant" allowed under the regulation:

> The ruling enforced a risk mitigant (or term of credit) against Hood and in favor of respondents, including Santa Barbara, in a transaction where Santa Barbara extended no credit to Hood. Santa Barbara's seizure of Hood's 2001 tax refund alleviated a risk incurred by a *third party* (Household Bank) under a preexisting transaction. The trial court thus applied the non-real estate lending regulation to a transaction where Santa Barbara made no loan and incurred no risk.

[Pet. App. 26a (emphasis added).]

The Court also determined that the non-real estate lending regulation could not apply in this context where Santa Barbara "has no lending relationship" with plaintiffs. [Pet. App. 27a.] Accordingly, the Court concluded that plaintiffs' claims "are outside the scope of the non-real estate lending regulation." [*Id.*] In so holding, the Court noted that it did not need to, as defendants insisted, "defer to the OCC's finding that national banks may participate in RAL cross-collection programs," because there is nothing in the OCC regulations that purports to condone the use of cross-collection provisions against consumers where a "lender" extends no credit to the consumer and seizes the consumer's refund to pay the proceeds to a third-party lender. [Pet. App. 28a-29a.]

Finally, the Court found that the visitorial powers doctrine does not preempt plaintiffs' claims because private parties' actions are not visitations. Citing a line of cases from around the nation, the Court correctly

concluded that the historic doctrine "applies to government actions" and not to actions by private parties for financial losses as well as declaratory and injunctive relief under the private attorneys general statute. [Pet. App. 19a.] The Court rejected the argument advanced by Petitioners that plaintiffs' action is "fundamentally regulatory," finding that plaintiffs' action "does not interfere with what respondents may do or how they may operate their banking business. Put another way, while the state cannot dictate to respondents how they can or cannot operate, it can insist that, however respondents choose to operate, they do so without violating debt collection laws and using deceptive business practices." [Pet. App. 19a.]

Petitioners sought review from the California Supreme Court, but that petition was denied.

REASONS FOR DENYING THE PETITION

I. THE COURT LACKS JURISDICTION TO REVIEW THIS INTERLOCUTORY STATE COURT ORDER COMPELLING ARBITRATION.

A. The Decision Below Is Not Final and Appealable Under 28 U.S.C. § 1257(a).

This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . " 28 U.S.C. § 1257(a). Section 1257(a) establishes a "firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). To be reviewable by this court, a State-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation

and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). This means that a state court's decision must be "final as an effective determination of the litigation and not merely of interlocutory or intermediate steps therein." *Id.* Section 1257's requirement of finality "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Here, since the California Court of Appeal did not issue a final judgment or decree, its decision is not yet appealable.

The Court of Appeal revised the grant of a motion for judgment on the pleadings and remanded to the trial court for further proceedings. Its opinion certainly is not final as an "effective determination of the litigation." *Jefferson*, 522 U.S. at 81. The decision below revising the grant of a motion for judgment on the pleadings is interlocutory and non-appealable under § 1257(a).

B. The *Cox Broadcasting* Exceptions to Section 1257's Final Judgment Requirement Do Not Apply.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court recognized four circumstances that may permit review of state court decisions prior to a final judgment. The first involves cases where "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. Second are cases in which "the federal issue, finally decided by the highest court in the State, will

survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Third are cases where "the federal claim has been finally decided with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The fourth and final exception arises where (a) "the federal issue has been finally decided in the state courts . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action;" *and* (b) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-83. None of these exceptions to § 1257(a)'s final-judgment rule applies here.

The first three *Cox Broadcasting* exceptions clearly do not apply because all claims and defenses on the merits are yet to be resolved, and thus could be subject to later appeals. This is not a case where "the federal issue is conclusive" in further proceedings or the outcome of these proceedings is "preordained," 420 U.S. at 479, because either party could still prevail on its unresolved merits claims or defenses. The first exception thus does not apply. Nor does the second exception apply since, if Ms. Hood fails to prove her state-law claims or Petitioners prevailed on a merits defense, the federal question asserted here would not "survive and require decision." *Id.* at 480. Likewise, the third exception does not apply because there is no state-law bar to a later appeal by any party, as there is in many criminal cases, *id.* at 481, in the event of an adverse judgment. Petitioners could appeal if Ms. Hood prevailed at trial. The first three *Cox Broadcasting* exceptions to § 1257(a)'s final judgment rule plainly do not apply.

Finally, the fourth *Cox Broadcasting* exception likewise does not apply here because this is not a case where "a refusal to review the state-court decision might seriously erode federal policy." *Id.* at 483. As Part III of this Opposition establishes, the only federal policy relating to the preemptive scope of the OCC's regulation is a policy relating to lending. This case, by contrast, involves debt collection, not lending. No immediate action by this Court is necessary to preserve a central federal interest of the OCC's regulations (as demonstrated by the presence of the Savings Clause in the regulations preserving state laws of the sort involved in this case).

In sum, this case presents no basis to depart from § 1257(a)'s imposition of a "firm final judgment rule." The Court thus lacks jurisdiction, and the petition should be denied.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT ON THE SPECIFIC ISSUE DECIDED BY THE COURT BELOW.

A. There Is No Conflict With Respect to a Presumption Against Preemption.

The Petition argues that the decision below conflicts with other decisions holding that there is no presumption against preemption in cites to cases involving lending activity, but cites to no cases, however, involving debt collection activity by banks. The Petition thus compares apples and oranges, or perhaps the comparison is even further afield, such as apples to ball bearings.

The question of which circumstances should direct a court to begin its analysis of a federal preemption issue

with a presumption against the preemption of state law depends entirely upon the context of the laws involved. The Court of Appeal's opinion correctly notes that the context is decisive – there are certain settings involving national banks where the presumption against preemption does apply, and other settings where it does not. The Petition ignores the question of context, blurring two very different situations in order to erroneously suggest that the Court of Appeal's decision creates disuniformity in the law.

When Congress legislates in a field traditionally occupied by the states in furtherance of their historic police powers, there is a presumption *against* finding federal preemption. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *see also Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005) (citations omitted) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'")) In *Bates*, this Court stated that when there are two equally plausible readings of a federal statute (or regulation, presumably), courts should adopt the reading that would find no preemption of state law. *Bates*, 544 U.S. at 449.

Put another way, "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This presumption applies both to the existence and scope of preemption, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and serves the purpose of assuring that "the federal-state balance" will not be disturbed unintentionally

by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Nonetheless, as the Court of Appeal noted below, there are some circumstances where the historic and constitutional presumption against preemption does not apply, and this is sometimes true with respect to the regulation of banks. Rather than looking at the properly nuanced law enunciated by the Court of Appeal, Petitioners conflate lending activity with debt collection activity, in order to manufacture a conflict. Petitioners would essentially like this Court to create an unqualified new rule of law amounting to the proposition that "there is never a presumption against preemption with respect to any state law that relates to any activity a national bank may engage in, whether that activity is lending activity or not." Petitioners cite to no case that would support such a sweeping rule, however, and Respondents know of no such case.

To the contrary, the Court of Appeal's decision is consistent with a line of cases that follow this Court's decision. While there are certain circumstances where there is not a presumption against preemption of some state laws, those circumstances do not extend to the setting involved here. The protection of consumers against abusive debt collection practices is a traditional area of state regulation. There are two decisions of this Court that explicitly state that the regulation of debt collection by national banks is generally a matter of state law. See *Atherton v. FDIC*, 519 U.S. 213, 222-223 (1997) (the "right to collect . . . debts" of national banks is "based on State law"), citing *National Bank v. Commonwealth*, 76 U.S. 353, 361 (1869). The *Atherton* case was cited with approval by this Court in *Watters*, 127 S.Ct. at 1566, and this Court gave no indication that it was overturning its earlier

statements that debt collection by national banks (as opposed to the lending activities involved in *Watters*) was governed by state law. Petitioner cherry picks from *Watters* language that relates to the lack of a presumption against preemption for certain types of banking activities, while ignoring the portions of *Watters* that leave untouched this Court's more specific guidance that there is a presumption against preemption with respect to debt collection.

This Court has held in cases involving national banks that the presumption against preemption applies when the issues involved concern state laws of general application. *See, e.g., Smiley v. Citibank (S.D.), N.A.*, 900 P.2d 690 (Cal. 1995), *aff'd*, 517 U.S. 735 (1996) (presumption against preemption of historic police powers of the states which "extend to consumer protection").

Petitioner refuses to acknowledge the distinction between lending and debt collection, and ignores the federal statute governing the latter topic. In fact, the Congress has acknowledged that debt collection is principally governed by state laws. This is established by the Federal Fair Debt Collection Practices Act, 15 U.S.C. Section 1601, et seq. (FDCPA), which specifically provides that "[f]or purposes of this section, a state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." 15 U.S.C. § 1692n. In particular, courts specifically have held that the FDCPA does not preempt California's Unfair Competition Law (which lies behind plaintiff's claim here) to the extent that the state statute provides for greater protection for consumers than federal law. See *Irwin v. Mascott*, 96 F.Supp.2d 968, 974 (N.D. Cal. 1999) (the FDCPA does not preempt state

laws, such as the Business and Professional Code section 17200, that regulate debtor/creditor relationships and provide greater protections from debt collectors than the FDCPA); see also *Heredia v. Green*, 667 F.2d 392, 397-398 (3d Cir. 1981), citing H.R. Rep. No. 95-131, 95th Cong., 1st Sess., 7, 8 (1977) (noting that the legislative history of the FDCPA recognizes importance of state law in battling abusive debt collection practices). In short, both Congress and the courts have recognized that it is a traditional responsibility of state law to protect consumers against abusive and deceptive debt collection practices. Accordingly, under the decisions of this Court, there is a heavy presumption against finding that these state laws are preempted by federal law.

Unlike Petitioner's open-ended approach to a presumption against preemption, the lower courts have followed this Court in recognizing that debt collection by banks is an exception where state law is ascendent. The lower court cited to a Ninth Circuit decision to note that there is not a general presumption against preemption in the field of banking when a case involves laws that target banks or seek to regulate banking. [Pet. App. 11a (citing *Bank of America v. City & County of San Francisco*, 309 F.3d 551, 558-559 (9th Cir. 2002)).] On the other hand, the Court below noted, it is still appropriate to apply a presumption against banking with respect to state laws of general application that are not targeted at banks. [Pet. App. 11a-12a.]

As the Court of Appeal recognized, this case does not involve traditional areas of banking. The Court stated, "Santa Barbara has no lending relationship with [plaintiffs]." [Pet. App. 27a.] To the contrary, the case involves debt collection, tort, contract and consumer protection,

areas of law traditionally reserved to the states. [Pet. App. 3a (case involves defendants' "agreements with other banks to collect outstanding RAL debts . . . ").]

In keeping with this Court's decision in *Atherton*, cited with approval in *Watters*, the Court below correctly held "[f]ederal courts recognize that national banks and federally regulated thrift organizations are subject to state laws governing debt collection." [Pet. App. 21a (citations omitted).] The Court of Appeal, therefore, correctly recognized that one size does not fit all when it comes to a presumption against preemption. It is appropriate to apply a presumption in some settings, and not in others. A presumption against preemption is appropriate where, as here, the laws at issue are laws of general application involving areas such as debt collection traditionally reserved to the states to enforce.

B. There Is No Conflict With Respect to the Issue of Deference to the OCC On the Issue Involved Here, Because the Lower Court Followed the OCC's Regulations.

Petitioners assert that this Court should grant review because the Court of Appeal "refused to accord the OCC the deference normally given federal agencies under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." [Petition at 16.] It is clear, however, that the Court of Appeal's conclusion that plaintiffs' state law claims are not preempted is, in fact, entirely consistent with and, indeed, compelled by the OCC regulations. It is Petitioners, not plaintiffs, who are at war with the OCC's regulations. In its effort to escape from the consequences of serially violating California's laws protecting against the unfair and abusive collection of debts,

Petitioners may wish that the OCC had not exempted from federal preemption state laws dealing with debt collection. As it happens, however, the OCC *did* explicitly draft regulations that exempt this body of state law from federal preemption. By recognizing and applying this specific and directly applicable federal regulation, the Court of Appeal followed the directions of the OCC. This is not a case where the Court of Appeal has chosen to disregard the regulatory structure set forth by the OCC, but rather a case where Petitioners would like this Court to re-write and re-work that structure. Accordingly, the application of *Chevron* deference is not an issue that calls for review by this Court.

The Petition also suggested that the issue of deference to the OCC would likely be informed by this Court's decision in *Watters*. In *Watters*, however, this Court did not reach the issue of deference to agencies. *See Watters*, 127 S.Ct. at 1527 n. 13. In any case, *Watters* is inapposite here, because (a) the state laws at issue in *Watters* are directly aimed at mortgage lending practices undertaken by "operating subsidiaries" of national banks, not at non-banking activities such as debt collection; and (b) there was no dispute that the state law at issue in *Watters* violates the OCC regulations, the only dispute was whether those OCC regulations are valid. This case, by contrast, involves contract, tort and debt collection. [Pet. App. 3a (case involves defendants' "agreements with other banks to collect outstanding RAL debts. . . .").] Unlike the frontal attack upon the OCC regulations attempted by Michigan in *Watters*, the Court of Appeal decision here was based upon respondents' argument that their causes of action fall within the express statements in the OCC regulations that provide that state laws involving contract,

tort and debt collection are saved or exempt from preemption. [Pet. App. 14a (citing these "savings clauses" or "catch-all" provisions).] Similarly, plaintiffs argue that, even were their claims not explicitly within the very specific exemption from preemption in the OCC regulations for debt collection, their claims nonetheless do not fall within the express preemption provisions of the OCC regulations. The Court of Appeal's acceptance of these language-based arguments [see Pet. App. 27a (plaintiffs' claims "are outside the scope of preemption encompassed by the non-real estate lending regulation")] stands entirely apart from Michigan's argument in *Watters* that the OCC regulations themselves were illegal.

It is true, as defendants note, that the Court of Appeal commented that administrative agencies are entitled to limited deference "concerning areas within their expertise." [Pet. App. 28a.] But taken as a whole, it is clear that the Court of Appeal based its decision upon the language of the OCC's regulations and the absence of any indication that the OCC approved of the practices at issue in this case. Far from being at war with the OCC, the Court's opinion is entirely consistent with the OCC's positions. The opinion does not criticize the OCC in any way, but instead cites OCC's statements with approval. [E.g., Pet. App. 23a (footnote omitted) ("The OCC has recognized that the UCL applies to national banks").] The decision in this case agrees with and implements the language of the OCC regulations, which explicitly preserves state laws regulating the business of debt collection (as opposed to lending).

C. There Is No Split on the Issue of Visitorial Powers.

The Court of Appeal held correctly and unremarkably that the visitorial powers doctrine does not apply to lawsuits between private litigants. This conclusion is directly in line with numerous courts to have considered the issue. Under Petitioners' sweeping theory, national banks are exempt from essentially all private class action lawsuits (such as those that have been brought or may be brought under the CLRA, the UCL and the FAA), because, in their unsupported view, this "litigation has a fundamentally regulatory character. . . ." This unsupportable theory was properly rejected by the Court of Appeal in this case, as many other courts have in other cases.

As an initial matter, plaintiffs' claims are not barred by federal preemption under the "visitorial powers" theory for the same reasons that preemption does not lie under the other arguments addressed above: (1) this case does not involve either loan-making or deposit-taking; and (2) the OCC regulations expressly preserve state laws relating to debt collection and deceptive statements from federal preemption. The language of 12 C.F.R. section 7.4000 makes clear that it only applies to deposit-taking and loan-making activities. As the foregoing discussion establishes, this case does not relate to either subject. Thus "visitorial powers" cannot be an independent ground of federal preemption.

Even if the activities could be said to come within the deposit-taking or lending functions, the OCC itself has directed that "the use of the courts for private civil cases" phrase in the NBA does not constitute an exercise of visitorial powers. Bank Activities and Operations, 69 Fed.

Reg. 1895, 1899, 2004 WL 50762 (Jan. 13, 2004). The term "visitorial powers" refers to the power of the OCC to "visit" a national bank to examine its activities and its observance of, and conformity to, applicable laws. The visitorial powers that are within the exclusive province of the OCC are the powers to conduct examinations of banks to determine compliance with banking laws to ensure banks' safety and soundness.

That Congress intended "visitorial powers" to mean the power to conduct such examinations is evident from the context of Section 484. That section is codified in a subchapter entitled "Bank Examinations." 12 U.S.C. § 484, subd. (a), *codified* in Subchapter XV of Title 12 of the United States Code. The provisions surrounding Section 484 address such technical issues as appointment and payment of examiners, special examinations, and waiver of examination requirements. 12 U.S.C. §§ 481-83, 485, 486.

The decisions of this Court are in accord. In *Watters*, this Court explained the meaning of the phrase "visitorial powers": the "Act vests visitorial oversight in OCC, not state regulators." 127 S.Ct. at 1572. The Court explained that the concern of the act was with the interference of "state regulators," and "multiple audits . . . and rival oversight regimes." 127 S.Ct. at 1573. The language and approach is purely aimed at state governmental oversight, not private lawsuits of the sort brought here.

In *Guthrie v. Harkness*, 199 U.S. 148 (1905), similarly, the Court interpreted visitation, as used in the predecessor to Section 484, to mean "the act of a superior or superintending officer, who visits a corporation to examine into its manner to conducting business, and enforce an observance

of its laws and regulations." *Id.* at 158 (citation omitted). In *Guthrie*, the Court noted that, while a national bank is a public institution subject to examination by the OCC, it is owned by shareholders and "it is subject by statute to be sued in the courts of the state." *Id.* at 157 (holding that shareholder suit to enforce common law right to compel inspection of books and records was not exercise of visitorial powers).

This Court has confirmed that "[t]he provisions of the Act requiring periodic examinations and reports and the powers of the Comptroller are designed to insure prompt discovery of violations of the [National Bank] Act and in that event prompt remedial action by the Comptroller." *Deitrick v. Greaney*, 309 U.S. 190, 195 (1940).[3] Through visitorial powers, "[w]henever the agencies deem it necessary, they may order 'a thorough examination of all the affairs of the bank,' . . . " *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963).[4]

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[3] Indeed, as the OCC describes its function,

> National bank examiners supervise domestic and international activities of national banks and perform corporate analyses. Examiners analyze a bank's loan and investment portfolios, funds management, capital, earnings, liquidity, sensitivity to market risk, and compliance with consumer banking laws, including the Community Reinvestment Act. They review the bank's internal controls, internal and external audit, and compliance with law. They also evaluate bank management's ability to identify and control risk.

("About the OCC, The Office of the Comptroller of the Currency" available at http://www.occ.treas.gov/aboutocc.htm, last visited April 27, 2007.)

[4] The state banking examiner possesses similar powers with respect to state chartered financial institutions. The phrase "visitorial powers," meaning the power to conduct this type of examination of an

(Continued on following page)

The concept of "visitorial powers" has rarely, if ever, been interpreted, however, to displace the power of federal and state courts to consider justiciable claims brought by private litigants to enforce the allegiance of a national bank to applicable state law. Indeed, a federal court in New York recently adopted the OCC's own interpretation of its visitorial powers authority and held that this power does not extend to suits by private parties:

> [T]he Attorney General cites several cases that he contends either explicitly or implicitly recognize the right of states to enforce their non-preempted laws against national banks. Each of these cases are inapposite, however as some involve private plaintiffs who do not themselves possess any visitorial authority.

Office of the Comptroller of the Currency v. Spitzer, 396 F.Supp.2d 383, 397 (S.D.N.Y. 2005). The Court went on to explain: The OCC's regulation bars states, not private parties, from enforcing laws against national banks, and it bars states from enforcing only those laws regulating the

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organization's affairs, has been used in state legislation in California and across the country. See, e.g., Cal. Ed. Code, § 94180 [in article entitled "Examination and Visitorial Power of the State," providing that "[t]he State Controller . . . [is] hereby authorized and empowered from time to time to examine the accounts and books of the [California Educational Facilities Authority], including its receipts, disbursements, contracts, sinking funds, investments and any other matters relating to its financial standing"; Ind. Code Ann., § 28-11-3-2 [in chapter entitled "Supervision of Financial Institutions," providing that the state's Department of Financial Institutions "has visitorial powers with respect to any financial institution for the purpose of maintaining the safety and soundness of the financial institution"]. (See also, Black's Law Dict. (7th ed.) at p. 1567 [defining "visitorial" as "of or relating to on-site inspection or supervision"].

content and conduct of federally authorized banking activities against national banks. *Id.* at 401.

Moreover, as the Court of Appeal correctly held, this action is not transformed into a public action because it contains private attorney general allegations. The filing of an action Under California's Unfair Competition Law by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer. See, e.g., *Payne v. National Collection Systems, Inc.*, 91 Cal.App.4th 1037, 1045 (2001) (UCL claim brought by a public prosecutor is "fundamentally different" from a class or representative action and is not res judicata). Put simply, plaintiffs are not state officials; they are private litigants. The OCC has explicitly recognized the distinction, noting that "the use of the courts for private civil cases" does not amount to visitations or the exercise of visitorial powers. Bank Activities and Operations, 69 Fed. Reg. 1895, 1899, 2004 WL 50762 (Jan. 13, 2004).

The Court of Appeal correctly held that the visitorial powers doctrine does not apply to plaintiffs' action.

III. THIS COURT NEED NOT REVIEW THIS CASE, AS THE COURT OF APPEAL'S DECISION IS ENTIRELY JUSTIFIED BY THE INDEPENDENT AND SUFFICIENT (AS WELL AS NON-CONTROVERSIAL AND WIDELY ACCEPTED) RULE THAT STATE LAWS ARE NOT PREEMPTED WHERE THEY MERELY PROVIDE FOR THE ENFORCEMENT OF RULES INCLUDED IN OTHER FEDERAL LAWS.

The Petition does not justify this Court's review for another reason: the Court of Appeal's decision is a

straightforward application of the normal rule that state laws will not be preempted when they address conduct that also violates federal law. As the Court of Appeal explained in some detail, the claims in this case "seek to redress the violation of federal standards that have been adopted as part of California law." [Pet. App. 22a.] The Court's point is evident from a simple comparison of the nature of the allegations in the complaint and the Fair Debt Collection Practices Act.

The fact that the plaintiffs' claims seek to redress violations of federal standards is decisive, as the Court of Appeal explained, because:

> Here, appellants' CLRA, UCL, and Rosenthal Fair Debt Collection Practices Act's causes of action allege facts that would support a cause of action based on violations of federal law that apply to respondents regardless of state law. Thus, those causes of action are not preempted because they do not impose any substantial limitations upon, or "obstruct, impair or condition" a bank's actions.

[Pet. App. 25a.]

The Court of Appeal's ruling on this point is entirely consistent with the decisions of a variety of courts, and is hardly controversial. *See, e.g., Bates*, 544 U.S. at 448 ("a state cause of action that seeks to enforce a federal requirement 'does not impose a requirement that is "different from, or in addition to," requirements under federal law.'") (citation omitted); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 157 (2006).

For all of Petitioners' inflamed rhetoric about the absolute primacy of federal law, defendants never explain

why this Court need revisit yet again the well-established principle that where – as here – a body of state law closely tracks and merely enforces a set of rules also set forth in federal law, those state laws are not subject to federal preemption.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: May 4, 2007

Respectfully submitted,

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In The

Supreme Court of the United States

SANTA BARBARA BANK & TRUST, *et al.*,

Petitioners,

v.

CANIEVA HOOD and
CONGRESS OF CALIFORNIA SENIORS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15(8) of this Court, Petitioners Santa Barbara Bank & Trust; Pacific Capital Bank, N.A.; Beneficial National Bank; Household Bank, f.s.b.; HSBC Taxpayer Financial Services, Inc.; JPMorgan Chase Bank, N.A.; First Bank of Delaware; Republic First Bank; First Security Bank of Mackinaw, Illinois; Republic Bank & Trust Company; and River City Bank, Inc. ("Petitioners" or the "banks") hereby submit this Supplemental Brief in support of their Petition for Writ of Certiorari filed as of April 2, 2007 (the "Petition").

GROUNDS FOR FILING A SUPPLEMENTAL BRIEF

Supreme Court Rule 15(8) provides in pertinent part that "[a]ny party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases . . . not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter[.]"

On April 17, 2007, fifteen days after the Petition was filed, this Court rendered its decision in *Watters v. Wachovia Bank, N.A.*, No. 05-1342, ___ S.Ct. ___, 2007 WL 1119539 (U.S. Apr. 17, 2007). The Petition advised this Court of the pendency of *Watters* and argued extensively why the opinion of the California Court of Appeal below should be reversed or vacated if *Watters* were to be affirmed. Now this Court has affirmed *Watters* and explained in depth the law of federal preemption under the National Bank Act.

Additionally, in the Court of Appeal and in the Petition in this Court, Petitioners relied extensively on the

reasoning of *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3233 (U.S. Sept. 30, 2005) (No. 05-431); and *National City Bank v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3267 (U.S. Nov. 7, 2006) (No. 06-653). In *Watters*, this Court expressly recognized the validity of these decisions. *Watters*, slip op. at 2 & n.1, 2007 WL 1119539, at *4 & n.1.

Because this Court's ruling in *Watters* was "not available" at the time of the filing of the Petition, and because this Court's analysis in *Watters* is critical to the issues presented in the Petition, the instant Supplemental Brief is proper under Rule 15(8).

ARGUMENT

Watters confirms the proposition that in the area of national banking activity, no presumption against preemption applies. *Watters*, slip op. at 6-7, 2007 WL 1119539, at *6-7. In assuming that a presumption against preemption did apply, and in rejecting federal authorities applying no such presumption, the California Court of Appeal committed a fundamental error requiring reversal.

The statements of the dissenting appellate justice are now proven to be correct:

> In my view, the majority should stay out of the federal banking business. . . .
>
> The majority errs, in my view, when it applies a presumption *against* preemption. This is a dispute over the performance of contracts by and

> between federally regulated national banks. As the United States Supreme Court has noted, the presumption against preemption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." (*United States v. Locke* (2000) 529 U.S. 89, 108, 120 S.Ct. 1135, 1147, 146 L.Ed.2d 69, 88.) National banking has been the subject of federal legislation and regulation for more than a century.

Hood v. Santa Barbara Bank & Trust, 143 Cal. App. 4th 526, 549 (2006) (Yegan, J., dissenting) (emphasis in original) [Pet. App.[1] 30a].

The trial court's statements, granting the banks judgment on the pleadings, likewise were prescient: "[A] presumption against preemption is not triggered when the state regulates in [a] field with a history of significant federal presence, and [] national banking is such a field. . . . [T]he presumption against preemption of state law is inapplicable." [Pet. App. 46a-47a (internal citations and quotations omitted).]

This Court has now reaffirmed the above principles:

> Business activities of national banks are controlled by the National Bank Act (NBA or Act), and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC). As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers.

Watters, slip op. at 1, 2007 WL 1119539, at *4 (citations omitted).

---

[1] "Pet. App." refers to the Petitioners' Appendix attached to the Petition for Writ of Certiorari.

> Nearly two hundred years ago, in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), this Court held federal law supreme over state law with respect to national banking. . . .
>
> In the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation.

Watters, slip op. at 5-6, 2007 WL 1119539, at *6. Congress has long been concerned with "inconsistent or intrusive state regulation." *Id.*, slip op. at 6, 2007 WL 1119539, at *6.

> We have interpreted grants of both enumerated and incidental powers to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law. . . . [W]hen state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.
>
> . . .
>
> Beyond genuine dispute, state law . . . may not curtail or hinder a national bank's efficient exercise of any [] power, incidental or enumerated under the NBA.

Id., slip op. at 6-8, 2007 WL 1119539, at *6-7 (quotations, citations and alterations in original omitted); *see also id.* at 8-9 n.6, 2007 WL 1119539, at *7 n.6 (favorably citing OCC finding that it is "costly and burdensome" to expose national banks to "multiple, often unpredictable, different state or local restrictions and requirements," and thus to do so would improperly prevent national banks "from operating in the manner authorized under Federal law").

A critical goal of the National Bank Act, this Court recognizes, is to create a system of national banks that is independent of State legislation that would regulate their core banking activities. *See Watters*, slip op. at 9, 2007 WL 1119539, at *7 (quoting *Easton v. Iowa*, 188 U.S. 220, 229, 231-32 (1903)). National banks' Congressionally-conferred powers "cannot be significantly impaired or impeded by state law." *Watters*, slip op. at 16, 2007 WL 1119539, at *10. "The NBA is thus properly read by OCC to protect from state hindrance a national bank's engagement in the 'business of banking[.]' " *Id.*

The present case involves national banks operating well within the scope of their Congressionally-conferred lending and deposit-taking powers under 12 U.S.C. § 24 (Seventh), as the RAL loans in question are repaid from federal tax refunds. *Compare Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (finding "complete preemption" in case relating to RAL lending) (favorably cited by this Court in *Watters*, slip op. at 6, 2007 WL 1119539, at *6), *with Watters*, dissenting op. at 2, 6 & n.9, 2007 WL 1119539, at *11, 13 & n.9 (describing mortgage lending as a historically recent expansion of national bank powers) (Stevens, J., dissenting). The trial court below ruled in favor of the banks, recognizing the substantial federal interest and applying the correct legal rule – now assuredly correct under *Watters*. The dissenting appellate justice similarly would have ruled in favor of the banks upon the understanding that no presumption against preemption should apply here.

Two justices of the Court of Appeal ruled against the banks, expressly applying the wrong legal presumption. *See Hood*, 143 Cal. App. 4th at 537, 547 [Pet. App. 11a-12a, 28a]. Moreover, the Court of Appeal expressly refused to follow federal precedents cited by the banks (and relied upon

by the trial court and the dissenting appellate justice) saying, "We are not bound by lower federal appellate court decisions." *Hood*, 143 Cal. App. 4th at 547 [Pet. App. 28a]. In *Watters*, slip op. at 2 & n.1, 2007 WL 1119539, at *4 & n.1, this Court expressly recognized the validity of those decisions, and the Court of Appeal committed plain error by rejecting them out-of-hand.

It is overwhelmingly clear that, in the present case, application of the wrong presumption made all the difference to the outcome. Now that this Court has announced the correct legal rule in *Watters*, the rule should be applied, and the decision of the Court of Appeal should be reversed.

CONCLUSION

For the reasons set forth above, and set forth in the Petition, Petitioners respectfully request that this Court grant the Petition, issue a writ of certiorari, and reverse or vacate the judgment of the California Court of Appeal.

Respectfully submitted,

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15.6 of this Court, Petitioners hereby submit this Reply Brief in support of their Petition for Writ of Certiorari (the "Petition").[1]

A. JURISDICTION IS PROPER UNDER *COX BROADCASTING* AND 28 U.S.C. § 2106.

Plaintiffs/Respondents first oppose certiorari on the ground that the Court of Appeal's decision is not "final." However, this case easily satisfies the finality standard under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Court of Appeal has issued a conclusive ruling on dispositive questions of federal law, the ruling is contrary to intervening authority from this Court and failure to grant certiorari will seriously erode federal policy.

The Superior Court entered a final judgment, which was set aside by the Court of Appeal through misapplication of federal law. The Court of Appeal expressly refused to apply federal precedents that are now known, by reason of the opinion in *Watters v. Wachovia*, 127 S. Ct. 1559 (2007), to be correct statements of the law.[2] Now, "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice, as well as precipitate interference with state litigation." *Cox Broadcasting*, 420 U.S. at 477-78 (internal quotation and citation omitted); *see also Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 388 n.4 (1964) (because of significance of federal issues, certiorari was appropriate in spite of the possibility of future proceedings). At a minimum, this Court should grant certiorari, vacate the

---

[1] Petitioners' corporate disclosure statement is set forth at pages iii-iv of the Petition.

[2] In addition to *Watters* itself, Petitioners also presented *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *cert. denied* (Apr. 23, 2007), and *National City Bank v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006), *cert. denied* (Apr. 23, 2007), in the briefing below.

decision of the Court of Appeal and direct it to reconsider its prior ruling in light of *Watters*. *See* 28 U.S.C. § 2106; *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (emphasizing importance of "GVR" orders to ensure uniformity of federal law); *Stutson v. United States*, 516 U.S. 163, 177, 180 (1996) (discussing power to issue GVR order to State court so that "intervening event" of recent ruling may be considered) (Scalia, J., dissenting). Certiorari is essential here "to secure uniformity of decision." *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Reinstatement of the Superior Court's judgment would terminate the litigation, protect the important federal policy at issue here, and prevent confusion over the scope of National Bank Act preemption in future California cases. Thus, the instant case differs vastly from *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), upon which Plaintiffs rely. *Jefferson* originally came to the Alabama Supreme Court on an interlocutory appeal. *Id.* at 77, 81. Here, by contrast, the Superior Court's judgment was final, and the issue on appeal was whether the judgment should be affirmed. If the federal questions are resolved in favor of Petitioners, the outcome will be to reinstate the original final judgment. In other words, "reversal of the state court [of appeal] on the federal issue would be preclusive of any further litigation." *Cox Broadcasting*, 420 U.S. at 482-83.

The Court of Appeal has rendered important final conclusions of federal law, including by barring the banks from reasserting the visitorial powers defense at any future stage of the proceedings. As a key purpose of National Bank Act preemption is to shield federally-chartered lenders from undue interference by States, the banks' federal rights are violated now and will be violated continuously if they must litigate further before obtaining review here. In this sense the Court of Appeal's judgment is "final" as well. *See Abney v. United States*, 431 U.S. 651, 659-60 (1977).

This Court also recognizes the importance of its certiorari jurisdiction to review State-court decisions that, if left unaddressed, threaten to "seriously erode federal policy." *See Cox Broadcasting*, 420 U.S. at 482-83. Here the Court of Appeal expressly (and erroneously) declined to follow numerous federal precedents, and its conclusion directly conflicts with this Court's subsequent decision in *Watters*. This Court has previously recognized that the federal interest in the national banking system is so substantial that in *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963), certiorari jurisdiction was exercised over a venue question, notwithstanding the "preliminary" nature of the issue and the possibility that the petitioner ultimately might prevail on a merits issue. Certiorari was granted to protect the national bank from "long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.*

So too here, the banks face extended litigation in State court if the preemption question is not resolved in their favor, with their judgment reinstated. "That the petitioner who protests against the state court's decision on the federal question might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue here is not preclusive of our jurisdiction." *Cox*, 420 U.S. at 487 n.13. This Court has jurisdiction, and certiorari should be granted.

B. THE FEDERAL INTEREST IN NATIONAL BANKING IS SUBSTANTIAL AND REQUIRES THIS COURT'S PROTECTION.

Given the undisputed character of the federal interest, numerous reasons exist to grant certiorari, as set forth in the Petition. This Court should reject Plaintiffs' efforts to recharacterize the Court of Appeal's decision as merely involving regulatory interpretation, rather than as involving incorrect application of a legal presumption in violation of the established precedent of this Court. The Court

of Appeal weighed too lightly the important federal interest in uniform operation of the national banking system. That is fundamentally how the Court of Appeal erred, and is fundamentally why certiorari is appropriate.

The Court of Appeal's application of an erroneous presumption against preemption colored its analysis of the OCC's regulations, necessitating review here. More significantly, as this Court recognized in *Watters*, preemption flows from the National Bank Act itself, and is not dependent upon the OCC's regulations. *See Watters*, 127 S. Ct. at 1567; *see also Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32-34 (1996). In *Watters*, this Court confirmed uniform views of the federal Circuit Courts that no presumption against preemption applies in the context of national banking. *Id.*, 127 S. Ct. at 1566-67. Plaintiffs concede that the Court of Appeal indeed applied a presumption against preemption. [Opp. 14-15.] Plaintiffs also concede, as they must, that the Court of Appeal only gave the OCC "limited deference." [Opp. 20.] That "limited deference," coupled with the incorrect view that a presumption against preemption applies, led the Court of Appeal to read the OCC's regulations narrowly, and to stretch to avoid preemption however possible. This also was error, and the two errors together reach Constitutional significance because they reflect an approach in California that undermines this Court's efforts to set forth uniform principles of preemption analysis.

Federally-regulated industries, like national banking, exist in a condition of "somewhat delicate balance of statutory objectives." *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (State-law claim preempted to maintain careful balance between competing interests in safety and medical innovation). The OCC is charged with overseeing the balance between consumer protection, on the one hand, and bank safety and soundness on the other. It violates the federal interest to let State-court litigation invade the OCC's prerogative to oversee and adjust that balance as the public interest may dictate. *See Watters*, 127 S. Ct. at 1564 ("OCC oversees the

operations of national banks *and their interactions with customers*") (emphasis supplied).

The Court of Appeal, however, wrongly suggested that preemption occurs only upon an affirmative showing of a "clear indication that the OCC condones" the specific challenged activity. [Pet. App. 29a.] Given the extensive history of federal activity in this area, the Court of Appeal imposed too strict a standard on the banks, and therefore erred. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000) (no "express statement of pre-emptive intent" is required). In *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141, 146 (1982), this Court concluded that the Supremacy Clause is violated by adopting a narrow reading of the intent to preempt, yet that is exactly what the Court of Appeal did here. It used a narrow canon of construction to evade the federal purpose, despite this Court's teaching that regulations should be read in a manner designed to achieve their overarching policies. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988).

The OCC has determined that the need for national uniformity in national banks' loan applications and other documents dictates that national banks must be exempt from "state law limitations concerning ... disclosure and advertising, including laws requiring specific statements, information or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents." 12 C.F.R. § 7.4008(d)(2)(viii). The OCC's regulation follows long-established authority of this Court recognizing that States may not impose special disclosure or advertising rules on national banks. *See Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79 (1954) (State truth-in-advertising statute held preempted as to national bank savings accounts). Plaintiffs nonetheless sue on the theory that the term in the Santa Barbara loan application, wherein Ms. Hood authorized repayment of the prior debt as a condition of requesting a new tax refund anticipation loan ("RAL"), was not properly disclosed to her as a matter of California law, and that even if the repayment condition

had been properly disclosed, it is "unfair" as a matter of California law.[3] Consideration of the disclosure claims by a California state court plainly violates the OCC's mandate.

Similarly, Plaintiffs' "unfairness" challenge under State law ignores the context in which the cross-collection arrangements reside. Banks enter into cross-collection agreements so that each bank is protected against the risk of accumulating losses on RAL lending operations. The national bank agreements under attack here make it possible for each bank to lend more safely and at lower cost, and thus the agreements are subject to the protection of 12 C.F.R. § 7.4008(d)(2)(ii), allowing "risk mitigants." Moreover, because the repayment condition required under the cross-collection agreement is implemented through express provisions in the written loan applications [*see* Pet. App. 101a-102a] it also is a "term of credit" protected from State-law challenge under 12 C.F.R. § 7.4008(d)(2)(iv). *See also Fidelity Federal v. De La Cuesta*, 458 U.S. at 146 (States may not regulate the terms of federally-chartered lenders' loan agreements).

To recharacterize the issue here as whether regulation of "debt collection" falls within traditional State police powers, as Plaintiffs suggest, improperly avoids the fundamental

---

[3] No federal claims or liability theories are alleged in the complaint. The Court of Appeal's statements [*see* Pet App. 22a, 25a] that Plaintiffs might pursue State-law remedies to enforce some unspecified duties under the Fair Debt Collection Practices Act or other federal laws lack all record support. Opposing certiorari, Plaintiffs suggest only that they someday might wish to pursue such theories. Even so, to allow State-law remedies to be tacked onto federal liability theories would itself implicate serious preemption concerns. "It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements." *United States v. Locke*, 529 U.S. 89, 115 (2000). "The appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation." *Id.*; *see also Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) ("a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go").

question under the Supremacy Clause, the National Bank Act and this Court's precedents: Is the federal interest in the national banking system impaired by allowing the claims in this litigation to proceed, given the nature of RAL lending activity? *See Easton v. Iowa*, 188 U.S. 220, 229 (1903) (State statute not saved from preemption merely because it was a statute of general application intended to prevent fraud). The National Bank Act's goal is to establish "a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Id.*[4]

Plaintiffs cannot dispute that longstanding guidance from the OCC contemplates that reciprocal collection arrangements are within national banks' powers:

> [I]t is both usual and necessary for banks to undertake collection activities with respect to their own delinquent loans. Thus, it is permissible for national banks to collect delinquent loans on others' behalf.

OCC Interpretive Letter, 1985 WL 151323 (Aug. 27, 1985).

By allowing national banks to better control and predict their delinquency risk, and thereby reduce the cost of lending, cross-collection benefits the nationwide populations of non-delinquent RAL borrowers and national bank depositors. The cross-collection arrangements at issue in

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[4] Plaintiffs' authorities do not challenge this principle. *Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997), for example, involved whether the federal Resolution Trust Corporation could pursue State-law theories when seeking to hold directors of a failed federal thrift responsible for breaches of fiduciary duties toward the thrift. It was appropriate in *Atherton* for the agency to look to State law for basic legal infrastructure setting forth duties of corporate directors, particularly when applying such law served the federal interest in mustering the assets of an insolvent thrift for the benefit of its depositors. Here, to apply State law would impair the assets of the national bank, and thus impair the interests of its depositors (and of the federal government, which insures a significant portion of those deposits).

this litigation, then, tie both to the lending power and the power under 12 U.S.C. § 24 (Seventh) to exercise "all such incidental powers as shall be necessary to carry on the business of banking." In the national banking context, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Barnett*, 517 U.S. at 34; *accord Watters*, 127 S. Ct. at 1567; *see also First Nat'l Bank v. California*, 262 U.S. 366, 368-69 (1923); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). If courts in every State can make their own unguided determinations that particular national banking practices may be enjoined as "unfair," the federal interest in uniform treatment of national banks, under OCC supervision, will be impaired immeasurably. *See Geier*, 529 U.S. at 885 (Court should not "tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended").

The Court of Appeal's analytical method conflicts with this Court's decisions under the National Bank Act. As a result, a key component of a federal lending program now faces a severe threat. Certiorari should therefore be granted.

C. THE VISITORIAL POWERS QUESTION IS SQUARELY PRESENTED AND SHOULD BE DECIDED.

Plaintiffs seek to displace the OCC in favor of a State court injunction. As explained in the Petition, the Superior Court and the dissenting appellate justice correctly determined that Plaintiffs' pursuit of class and private attorney general claims is "visitorial" in character, in that pursuit of the claims would improperly interfere with the OCC's exclusive regulatory and enforcement powers. Plaintiffs do not seriously dispute that their aim is to regulate the banks by prohibiting their cross-collection arrangements.

Instead, Plaintiffs rely wholly on the Court of Appeal's conclusion that in civil litigation commenced by non-governmental plaintiffs, there is a *per se* bar on consideration of the visitorial powers defense. [*See* Pet. App. 17a-20a.] This is far too narrow a reading of the visitorial powers doctrine. It is immaterial that the attempt to regulate the banks comes in the form of private attorney general or class action litigation, rather than in a formal State regulatory proceeding. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 1510-11 (2006) (pendency of a class action lawsuit may frustrate or delay normal business activity in violation of Congressional policy); *Buckman*, 531 U.S. at 353 (where "litigation would exert an extraneous pull on the scheme established by Congress, [] it is therefore pre-empted by that scheme").

No circuit split existed when certiorari was granted in *Watters*, yet this Court deemed the issue significant enough to merit review. *See also Ballard v. Commissioner*, 544 U.S. 40 (2005) (granting certiorari despite lack of a Circuit split, but where one appellate judge had dissented). As explained in the Petition, a split exists here between federal and state authorities, principally at the trial court level. Heightening the significance of the split, however, is that the federal district courts sitting in California do *not* apply the Court of Appeal's *per se* bar on considering the visitorial powers doctrine outside the context of formal action by State officials. Whether the visitorial powers doctrine ever may be invoked in private-party litigation is squarely presented here. The issue is a critically important one, meriting this Court's certiorari review.

CONCLUSION

For the reasons set forth above, and set forth in the Petition and their Supplemental Brief, Petitioners respectfully request that this Court grant the Petition, issue a writ of certiorari, and reverse or vacate the judgment of the California Court of Appeal.

Respectfully submitted,

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